S. Hrg. 98-1042

COIN-OPERATED PHONORECORD PLAYER COPYRIGHT ACT OF 1983

HEARING

BEFORE THE

SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 1734

A BILL TO AMEND TITLE 17 OF THE UNITED STATES CODE WITH RESPECT TO PUBLIC PERFORMANCES OF NONDRAMATIC MUSICAL WORKS BY MEANS OF COIN-OPERATED PHONORECORD PLAYERS, AND FOR OTHER PURPOSES

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COIN-OPERATED PHONORECORD PLAYER COPYRIGHT ACT OF 1983

WEDNESDAY, JUNE 20, 1984

U.S. Senate,
Subcommittee on Patents,
Copyrights and Trademarks,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, in room SD–226, Dirksen Senate Office Building, at 9:35 a.m., Senator Charles McC. Mathias, Jr. (chairman of the subcommittee), presiding.

Also present: Senator Metzenbaum.

Staff present: Ralph Oman, chief counsel; Steven J. Metalitz, staff director; Thomas P. Olson, counsel: Pamela S. Batstone, chief clerk; Conrad Wong, intern; Julie Ann Ontko, staff assistant (Subcommittee on Patents, Copyrights and Trademarks); Beverly E. McKittrick, counsel (Subcommittee on Criminal Law); Renn M. Patch, counsel (Subcommittee on the Constitution); Ellen Broadman, minority counsel (Subcommittee on Patents, Copyrights and Trademarks); and John Podesta, minority chief counsel (Subcommittee on Security and Terrorism).

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator Mathias. The subcommittee will come to order.

The Subcommittee on Patents, Copyrights and Trademarks meets this morning to hear testimony on S. 1734, the Coin-Operated Phonorecord Player Copyright Act of 1983, otherwise known as the jukebox bill.

This is where I came in. [Laughter.]

As Ben Zelenko will remember, when I came to the House of Representatives, the subject that mesmerized the attention of the House Judiciary Committee was the jukebox bill. So here we are, revisiting that subject.

For most of its history, the jukebox was on the fringes of the copyright law, and I am sure that many of today's witnesses wish it were back in that nether region again.

The 1909 Copyright Act said nothing specifically about jukeboxes, because the word wasn't even known, let alone the machine invented. It was not until 1976 that Congress required jukebox operators to pay a royalty to composers who write the music that is played on the jukebox.

Congress at that time also gave the Copyright Royalty Tribunal the power to adjust the rate of the royalty from time to time. In fact, the Tribunal did so in 1982 when it raised the rate from $8 a year per box to $50 a year per box effective this year.

Now, Senate bill 1734 would change that policy. It would shift the royalty payment from the owner of the jukebox to the manufacturer or the importer, as the case may be, and make the royalty a one-time, nonadjustable $50 payment in place of the current ongoing annual fee. Obviously, that would change the role of the Copyright Royalty Tribunal.

[A copy of S. 1734 follows:]

II

98TH CONGRESS
1ST SESSION

S. 1734

To amend title 17 of the United States Code with respect to public performances of nondramatic musical works by means of coin-operated phonorecord players, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, AUGUST 1), 1983

Mr. ZORINSKY (for himself, Mr. PRYOR, Mr. PRESSLER, Mr. JOHNSTON, and Mr. ABDNOR) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17 of the United States Code with respect to public performances of nondramatic musical works by means of coin-operated phonorecord players, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Coin-Operated Phonorecord Player Copyright Act of 1983".

SEC. 2. That Congress hereby finds and declares that—

(1) to promote the progress of science and useful arts, the Constitution of the United States empowers the Congress to give authors and inventors the exclu-

sive right to their respective writings and discoveries for a limited time;

(2) the coin-operated phonorecord player industry contributes to the cultural and economic well-being of the public;

(3) copyright owners should receive fair compensation for their creative endeavors and for the use of their property;

(4) coin-operated phonorecord player operators are a primary source for purchasing and promoting copyrighted nondramatic musical works;

(5) performance of nondramatic musical works by means of a coin-operated phonorecord player infringes on the exclusive rights granted to copyright owners under section 106(4) of title 17, United States Code;

(6) the more than 525 per centum increase in the royalty fee for coin-operated phonorecord players approved by the Copyright Royalty Tribunal will cause major disruptions in the coin-operated phonorecord player industry;

(7) the current compulsory license system for coin-operated phonorecord players is difficult to administer, to comply with, and to enforce;

(8) the continued economic disruption to the coin-operated phonorecord player industry should be minimized; and

(9) the public and the coin-operated phonorecord player operator should continue to have access to copyrighted nondramatic musical works through a compulsory license established: (A) for importers and manufacturers of coin-operated phonorecord players based upon payment of an annual license fee of $50 per phonorecord player manufactured or imported and distributed during the calendar year; and (B) for operators of coin-operated phonorecord players owned by the operator on the effective date of this Act for use thereafter based upon payment of a one-time license fee of $25 per phonorecord player.

SEC. 3. Chapter 1 of title 17 of the United States Code is amended by amending section 116 to read as follows:

"SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS: PUBLIC PERFORMANCES BY MEANS OF COIN-OPERATED PHONORECORD PLAYERS

"SEC. 116. (a) LIMITATION ON EXCLUSIVE RIGHT.—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

"(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless such proprietor is the manufacturer, importer, or operator of the phonorecord player and fails to secure the compulsory license established under this section.

"(2) The manufacuturer or importer of the coin-operated phonorecord player manufactured and distributed in the United States, or imported into and distributed in the United States on or after the effective date of this section shall obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, depositing the statement of account and paying the royalty fee provided for in this section.

"(3) The operator of the phonorecord player shall obtain a compulsory license to perform the work publicly on any phonorecord player owned by the operator prior to the effective date of this section for use thereafter by filing the application, depositing the statement of account and paying the royalty fee provided for in this section.

"(b) COMPULSORY LICENSE FOR COIN-OPERATED PHONORECORD PLAYERS—MANUFACTURERS AND IMPORTERS.—

"(1) Notwithstanding the provisions of section 106(4), the importation into and distribution in the United States, and the manufacture and distribution in the United States on or after the effective date of this section of any coin-operated phonorecord player shall be the subject of compulsory licensing if the importer or manufacturer of the player files the application, deposits the statement of account and pays the royalty fee specified in this section.

"(2) The importer or manufacturer shall, at least one month before the distribution in the United States of any coin-operated phonorecord player or within sixty days after the effective date of this section, whichever is later, file with the Register of Copyrights (hereinafter referred to as the 'Register') an application, including a statement of its identity and address and a description of any trade or business names, trademarks, or like indicia that it uses in connection with the importation, manufacture or distribution of coin-operated phonorecord players in the United States, and thereafter, from time to time, such further information as the Register may prescribe by regulation to carry out the purposes of this section.

"(3) The importer or manufacturer shall deposit with the Register in accordance with requirements prescribed by the Register by regulations, a statement of account specifying the number of coin-operated phonorecord players imported into, or manufactured and distributed in the United States during the prior calendar quarter, together with such other information, and in such form, content, and manner as the Register prescribes by regulation. In the case of all statements of account deposited by the manufacturer or importer, the statement shall be accompanied by a total royalty fee for the period covered by the statement in accordance with subsection (d)(1) of this section.

"(c) COMPULSORY LICENSE FOR COIN-OPERATED PHONORECORD PLAYERS—OPERATORS.—

"(1) Notwithstanding the provisions of section 106(4), the performance of a work on a coin-operated phonorecord player owned by an operator prior to the effective date of this section for use thereafter shall be subject to compulsory licensing. The operator of the phonorecord player shall file the application, deposit the statement of account, and pay the royalty fee specified in this section.

"(2) The operator shall within sixty days after the effective date of this section—

"(A) file with the Copyright Office, in accordance with regulations prescribed by the Register, an application containing—

"(i) the name and address of the operator of the phonorecord player, and

"(ii) the manufacturer and serial number or other explicit identification of the phonorecord player,

"(B) deposit a statement of account specifying the number of coin-operated phonorecord players owned by the operator prior to the effective date of this section for use thereafter, and

"(C) pay the royalty fee for each such player in accordance with subsection (d)(2) of this section.

"(3) Any operator who complies with the provisions of this subsection shall be assessed pursuant to paragraph (4) only and shall not, by reason of such compliance, be subject to liability under chapter 5 of this title or under any other law for failing to obtain a compulsory license for any year or lesser period of time prior to the effective date of this section.

"(4) The royalty fee required under this section shall be assessed on a one-time basis on each phonorecord player owned by the operator on the effective date of this section for use thereafter. The operator shall not be required to file an application, deposit a statement of account, or pay a royalty fee for any phonorecord player purchased after the effective date of this section.

"(5) The operator may elect to pay the royalty fee specified in this section on a quarterly basis for a period not to exceed two years, pursuant to regulations promulgated by the Register.

"(d) Computation of Royalty Fees.—

"(1) The royalty fee payable by the manufacturer or importer under section (b) shall be $50 per phonorecord player.

"(2) The royalty fee payable by the operator under subsection (c) shall be based upon the number of years of useful life remaining to the phonorecord player under regulations promulgated by the Register, provided that the fee shall not exceed $25 dollars per phonorecord player.

"(e) List of Phonorecord Players Registered.—The Register shall keep a current list of all phonorecord players that have been registered by the manufacturer, importer, and operator. Such list shall be available to the public.

"(f) Distribution of Royalties.—

"(1) The Register shall receive all royalty fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest, by the Copyright Royalty Tribunal, as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a detailed statement of account covering all royalty fees received for the relevant period.

"(2) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with the regulations prescribed by the Tribunal. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subsection (f)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

"(3) After the first day of October of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subsection (f)(1). If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

"(4) The fees to be distributed shall be divided as follows:

"(A) to every copyright owner not affiliated with a performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement; and

"(B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

"(5) During the pendency of any proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(6) The Tribunal shall distribute the royalties collected under this section in a manner designed to ensure that the artist who created the copyrighted work shall receive fair reimbursement for his efforts.

"(g) REGULATIONS BY REGISTER.—The Register of Copyrights shall promulgate rules and regulations necessary to carry out the provisions of this section.

"(h) CRIMINAL PENALTIES.—Any person who knowingly makes a false representation of a material fact in an application or deposit of account filed under this section shall be fined not more than $2,500.

"(i) DEFINITIONS.—As used in this section:

"(1) A 'coin-operated phonorecord player' means a machine or device that—

"(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

"(B) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

"(C) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

"(2) An 'importer' means any person who brings or causes to be brought a coin-operated phonorecord player into the United States from outside the country.

"(3) An 'operator' means any person who, alone or jointly—

"(A) owns a coin-operated phonorecord player;

"(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

"(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

"(4) A 'manufacturer' means any person who produces or causes to be produced a coin-operated phonorecord player.

"(5) A 'performing rights society' means an association or corporation that licenses the public performance of nondramatic musical works on behalf of copyright owners.

"(6) 'Antitrust laws' means the Federal Trade Commission Act and those laws described in the first section of the Clayton Act.".

SEC. 4. (a) Section 801 of title 17, United States Code, is amended in subsection (b)(1) by striking out "sections 115 and 116" each place it appears and inserting in lieu thereof "section 115".

(b) Section 804(a) of title 17, United States Code, is amended—

(1) by striking out "sections 115 and 116" and inserting in lieu thereof "section 115"; and

(2) by striking out paragraph (2)(C).

○

Senator MATHIAS. We have a large number of witnesses to hear today, so for that reason I am going to ask them to submit their written statements, which will all be included in full in the record, and to limit their summaries of those statements to not more than 5 minutes. That will give us some time for questions, and I hope you will not be offended if we enforce the 5-minute rule very strictly.

We will keep the record open for 4 weeks for any additions that witnesses might wish to make based on our hearing today, and any further information that may be adduced.

The first witness will be the distinguished Senator from Nebraska, Mr. Zorinsky, followed by the distinguished Senator from New York, Mr. D'Amato, and the Senator from Tennessee, Mr. Sasser. After the members of the Senate have testified, the Register of Copyrights, Mr. Ladd, and the Commissioner of Patents and Trademarks, Mr. Mossinghoff, will appear.

Following their testimony, we will hear from several distinguished witnesses from the private sector.

Senator Zorinsky, we are happy to welcome you to the Judiciary Committee.

STATEMENT OF HON. EDWARD ZORINSKY, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator ZORINSKY. Thank you, Mr. Chairman, and thank you for taking time out of your busy schedule to hold this hearing.

Senator MATHIAS. This morning, it is not time out of my busy schedule, it is out of the few rare hours we have to sleep around here.

Senator ZORINSKY. I was with you last night, and I certainly agree with you.

I am very pleased to be here today and to be given this opportunity, Mr. Chairman, and I hope that by providing an opportunity for everyone involved to be heard, you and the rest of the committee will be able to better see the need to address the problems raised by the Copyright Royalty Tribunal's decision in 1981.

You are going to hear today from some witnesses in opposition to S. 1734, and I would like to address several of the points that I expect they will raise.

The first is the matter of the onetime fee paid by the manufacturer or importer of a jukebox. While this appears to be a novel approach, as you well know, Mr. Chairman, it is certainly not unprecedented in legislation pending before this committee. I would like to think that it would appeal to the copyright holders, for it establishes a system to ensure complete compliance.

In addition, this new method would eventually eliminate the enforcement expenses now borne by the copyright societies.

The second point to consider is the amount of the fee and the impact it has on both sides. You will hear testimony that in 1978, the first year of the licensing fee at $8 per machine, $1,140,000 was paid to the Copyright Office. At $50 per machine, $4,378,000 has been paid in fees so far this year.

In 1978, there were 144,000 machines, which were licensed, and obviously maybe some of them weren't licensed, but the correlating figures are the same for 1978 in not licensing versus licensing as they are currently. So far this year, the number is down to 86,532, a drop of almost 60,000 machines.

Mr. Chairman, you will hear today from several small businessmen who will explain why this decline has occurred. As a former businessman in that specific business, Mr. Chairman, I can tell you that from 40 years in the jukebox business in my family, I can personally relate to you that we have had some pretty good times and some pretty bad times.

Currently, the business has been liquidated as of about 3 years ago due to the high interest that exists today, and the fact that jukeboxes no longer make sufficient money to be in that business when there are other businesses that you can attain a greater degree of profit with the same amount of investment.

These small businessmen will tell you how the increased fee has proven too much to bear. It is not the only fee: The municipalities charge fees, and there is a sales tax on the fees. When I was in the jukebox business, we used to buy a jukebox for $300. That is a vast difference from what they sell for today, about several thousand percent more today.

I notice that the Copyright Tribunal in some areas—ASCAP—compares how good times were in 1954 for the jukebox industry. Well, I might say that times were pretty good for the Congress then. We didn't have a $200 billion deficit in those days, and interest rates weren't going up as they are now and, you know, times do change.

This is what I attempt to do with this legislation, is recognize the change in times. When times are good, people can pay, and people can afford to pay, and should pay, and when times are bad, if it is concerning the demise of an industry, and the elimination in confiscatory rates set by a tribunal, then I think it time to do something about it.

I don't think Congress had in mind when it passed the Copyright Act of 1976 that they put this entity out of business. They didn't intend from the industry to go from paying $1 in licensing fees in the first year to $4.5 million 6 years later on 40 percent fewer machines, and I don't think the intent of Congress was to do so.

Mr. Chairman, because of the several changes that have occurred since 1976, both in the nature of the jukebox industry and the CRT ruling, I think it is only reasonable for the Congress to take some time to review the whole situation.

In fact, we would be derelict if we didn't. We are the ones who began and imposed this situation to begin with. It is not unusual for Congress to do this. We are constantly refining and reworking earlier decisions when the need is shown.

To those who will say that the issue has been appealed throuqh the courts and that should be the end of it, I have this response, Mr. Chairman: The Congress is constantly being asked by an affected party to enact legislation after courts and Federal agencies have made decisions, and this is not inappropriate.

I have been a member of the Federal institution long enough to know that we are not perfect. The court or agency may not be interpreting the law as Congress intended, and conditions may have changed, or the demands of society may dictate the need for new legislation. We in the Congress must be willing to adapt as situations demand.

Finally, Mr. Chairman, I would like to offer an alternative for the committee to consider, for those who believe as I do that the private marketplace is the better way to go. Instead of having licensing requirements for jukeboxes go through the Copyright Office, we could completely eliminate that fee and then work out a formula to set the mechanical fee now paid on each record sold to include a jukebox fee.

This method has several attractive features, one being that it would be a more accurate way of measuring which artist's work is being used and to what extent being played, and thus it is not necessary to rely upon some survey or monitoring device, and it also is a more efficient system.

The record companies already do this in the collection and payment of the mechanical fee. We must eliminate the work of the Copyright Office in the collection and the CRT in the distribution of the fees. The artists would receive more of what they have earned as we would be cutting out some middle people. Of course, these middle people are going to complain, but that is to be expected.

Mr. Chairman, at this time I would like to ask that the statement, a letter, and the University of California Law Review article, submitted on behalf of the National Small Business Association, be included in the hearing record.

Senator MATHIAS. Without objection, it will be included in the record.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SENATOR EDWARD ZORINSKY

Thank you Mr. Chairman. I am very pleased to be here today, and I want to particularly thank you for holding this hearing.

Mr. Chairman, I hope that by providing an opportunity for everyone involved to be heard, you and the rest of the committee will be better able to see the need to address the problems raised by the Copyright Royalty Tribunal's decision in 1981.

You are going to hear today from some witnesses in opposition to S. 1734. I would like to address several of the points I expect they will raise. The first is the matter of a one-time fee paid by the manufacturer of importer of a jukebox. While this appears to be a novel approach, as you well know, Mr. Chairman, it is certainly not unprecedented in legislation pending before this committee. I would think that it would appeal to the copyright holders for it establishes a system to ensure complete compliance. In addition, this new method would eventually eliminate the enforcement expenses now borne by the copyright societies.

The second point to consider is the amount of the fee and the impact it has on both sides. You will hear testimony that in 1978, the first year of the licensing fee, at $8.00 per machine, $1,140,160 was paid to the Copyright Office. At $50 per machine, $4,378,323 has been paid in fees so far this year. In 1978 there were 144,254 machines licensed; so far this year the number is down to 86,532, a drop of almost 60,000 machines. Mr. Chairman, you will hear today for several small businessmen who will explain why this decline has occurred. These small businessmen will tell how the increased fee has proven too much to bear, forcing them to discontinue the operation of some of their machines. Is this what the Congress had in mind when it passed the 1976 Copyright Act? Did the Congress intend for the industry to go from paying $1,000,000 in licensing fees the first years to $4½ million 6 years later on 40 percent fewer machines? I do not think so.

Mr. Chairman, because of the several changes that have occurred since 1976, both in the nature of the jukebox industry, and in the C.R.T. ruling, I think it is only reasonable for the Congress to take some time to review the whole situation. In fact, we would be derelict if we do not. It is not unusual for Congress to do this; we are constantly refining and reworking earlier decisions when the need is shown.

To those who will say that the issue has been appealed through the courts and that should be the end of it, I have this response, Mr. Chairman: The Congress is constantly being asked by an affected party to enact legislation after courts and Federal agencies have made decisions, and this is not inappropriate. The court or agency may not be interpreting the law as Congress had intended, conditions may have changed, or the demands of society may dictate the need for new legislation. We in the Congress must be willing to adapt as situations demand.

Finally, Mr. Chairman, I would like to offer an alternative for the committee to consider for those who believe, as I do, that the private market place is the better way to go. Instead of having the licensing requirements for jukeboxes go through the Copyrights Office, we could eliminate that fee completely. We could then work out a formula to set the mechanical fee now paid on each record sold to include a jukebox fee. This method has several attractive features; one being that it would be a more accurate way of measuring which artist's work is being used, played and thus it is not necessary to rely upon some survey or monitoring. It is also a more efficient system; the record companies already do this in the collection and payment of the mechanical fee. We thus eliminate the work of the Copyright Office in the collection, and the C.R.T. in the distribution, of the fees. The artists would receive more of what they have earned as we would be cutting out some of the middle people. Of course, these middle people are going to complain, but that is to be expected.

Mr. Chairman, again I want to thank you for your taking the time to hold this hearing.

National Small Business Association
"The Voice of Small Business"
Founded 1937

Hon. Edward Zorinski
Senate Russell Office Building
Room 443
Washington, DC 20510

June 19, 1984

Dear Senator Zorinski:

The National Small Business Association, representing over 50,000 members, wishes to express its support for your bill S.1734 since the bill's objective seems to be a logical solution that would allow those small businesses and their employees in the mechanical music box industry to survive.

As indicated by other witnesses at these hearings, the number of jukeboxes in use has declined dramatically. The amount of money collected by the copyright office, based on the registration fees, would have dropped sufficiently if the fees had not been adjusted.

Since the coin-operated mechanism cannot be economically adjusted to compensate for any increases in fees, the owners of the machines cannot use normal accepted inflationary adjustment as they are caught in the middle by the increased costs of copyright payments and the inability to pass on the higher costs to consumers. This has already forced a great number of owners of the equipment to go out of business. Another important factor is that these music boxes and the mechanical installation costs ($2,500-$3,500) must be financed, again adding additional costs to the owners of the automatic machines.

New technology, such as large screen television and the showing of video tapes, has, in many cases, replaced the music boxes as a means of entertaining patrons in a business establishment. Thus, the anticipated income that could have been expected from the original investment just is not there and the coin-operated music boxes are uneconomic to keep in place and are therefore removed.

There is nothing in the law that provides for a fixed income for the artists and composers in the entertainment industry. To place upon this declining small business industry an additional fee would simply cause other owners and their employees to leave the industry and would also cause the closing of the few manufacturing establishments that are still in business.

Our economy had to adjust in the making of wagon wheels when the automobile industry became viable. The same is true about the music box industry which may eventually need to remove its machines from installations because of other competition. To continue to place additional burdens on the industry advances the time of the demise of a once healthy industry.

We are taking the liberty of enclosing a copy of an article from the University of California Law Review, Volume 72-103, on "Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation", which we hope you can place in the record of the hearings.

Sincerely yours,

Herbert Liebenson

Herbert Liebenson
President

[From California Law Review, Vol. 72:103, 1984]

Controlling the Market Power of Performing Rights Societies: an Administrative Substitute for Antitrust Regulation

The public performing rights[1] to most copyrighted musical works in this country are licensed by two major performing rights societies—the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).[2] Individual copyright owners assign these organizations the right to license nondramatic public performances of their musical compositions. Performing rights societies in turn issue blanket licenses entitling licensees to perform any and all works in the societies' repertories. The fees for such blanket licenses are generally based upon a percentage of the licensees' gross receipts rather than upon the popularity of works performed or number of performances rendered.[3]

Because ASCAP and BMI together maintain a virtual monopoly over the licensing of musical performance rights in this country, their operations and practices frequently have been challenged under United States antitrust laws. In particular, the societies' practice of issuing blanket licenses has been vulnerable to charges that it eliminates price competition between individual compositions, since licensees are entitled to perform any work in the societies' repertories for a fee not based on actual use. Both ASCAP and BMI have been the targets of numerous governmental and private antitrust actions. As a result, both organizations are subject to substantial regulation pursuant to judicially enforced consent decrees and are prohibited from issuing blanket licenses to certain groups of users. Most recently, in *Buffalo Broadcasting Co. v. ASCAP*,[4] both organizations were enjoined from issuing blanket performance licenses to local television broadcasters.

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[1] The exclusive right to publicly perform copyrighted musical works is provided for by 17 U.S.C. § 106(4) (1982).

[2] ASCAP and BMI together handle the bulk of nondramatic licensing transactions in this country. ASCAP, the larger of the two organizations, is an unincorporated membership association consisting of approximately 8,000 music publishing companies and 21,000 writers, composers and lyricists; it boasts a repertory of over 3 million compositions. BMI is a nonprofit corporation affiliated with approximately 22,000 publishers and 38,000 writers, with about 1 million compositions in its repertory. Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 277 (S.D.N.Y. 1982).

[3] S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 163 (rev. ed. 1977). *See also infra* note 15.

[4] 546 F. Supp. 274 (S.D.N.Y. 1982).

This Comment argues that the regulation of performing rights societies through the enforcement of antitrust laws is inappropriate and inefficient. Such regulation would be better achieved by the establishment of an administrative agency to oversee those societies' practices. Part I of this Comment outlines briefly the history, development, and licensing practices of ASCAP and BMI. Part II discusses the advantages of the blanket licensing of performance rights in copyrighted musical works. Part III describes the various public and private antitrust actions that have been brought against ASCAP and BMI to guard against abuses of market power under blanket licensing, and the resulting limitations that have been imposed upon their practices. Part IV argues that antitrust laws are fundamentally ineffective in preventing performing rights societies from exploiting their monopoly powers. In particular, this Comment will argue that the goal of antitrust enforcement—promoting price competition among musical compositions—is unrealistic and quixotic in a market where price seldom influences a user's selection of music. Finally, Part V examines the administrative agencies that Great Britain and West Germany have established to oversee the practices of performing rights societies. This Comment proposes that the United States establish a comparable agency to effectively regulate performing rights licensing and curb the monopolistic practices of performing rights societies.

I

Performing Rights Societies

Composers who have obtained copyright protection for their musical compositions enjoy certain exclusive rights under the copyright laws.[5] Among these is the right to "perform the copyrighted work publicly" or to authorize another's public performance of the composition.[6] Performance rights have been granted to copyright holders since 1897,[7] but for many years composers' revenues were comprised primarily of royalties from the sale of sheet music rather than from public performances of the work. With the advent of the phonograph and the rise of the broadcast media, however, performance rights assumed primary importance for copyright owners.[8]

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[5] 17 U.S.C. § 106 (1982). These rights include the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies or phonorecords to the public, to perform the work publicly, and to display the work publicly.

[6] 17 U.S.C. § 106(4) (1982).

[7] Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (codified as amended at 17 U.S.C. § 106(4) (1982)).

[8] *See* B. Kaplan & R. Brown, Cases on Copyright 430 (1960). Public performances are currently the major source of revenue in the music industry, with ASCAP alone generating well over $125 million in royalties annually. A. Latman & R. Gorman, Copyright for the Eighties 455 (1981).

The ephemeral nature of public performances made it difficult for copyright owners to detect unauthorized performances of their works. At the same time, potential licensees often found it difficult to locate the author of a particular work to negotiate a license authorizing performances. To resolve the related problems of enforcement and licensing of performance rights, a group of prominent American composers banded together in 1914 to form ASCAP.[9] Thus, ASCAP was designed as a clearinghouse for the licensing and enforcement of statutorily guaranteed performance rights.

Composers, lyricists, and publishers become members of ASCAP by assigning the organization the nonexclusive right[10] to license nondramatic public performances[11] of their works. ASCAP in turn grants licenses to networks, local television and radio stations, theaters, bars, restaurants, and other users of copyrighted music.[12] ASCAP offers licenses to these users on either a blanket or per-program basis. Blanket licenses entitle licensees to perform any work in ASCAP's repertory for the duration of the license—generally one year. Fees for such licenses depend on the nature of the licensee's business, although all similarly situated licensees must be treated equally.[13] Generally, however, fees are a flat rate or are based upon a fixed percentage of some measure of the licensee's gross revenues.[14] Fees thus do not reflect the actual number of such works used or the number of performances rendered.[15] Per-program licenses, like blanket licenses, enable the licensee to use any work in the society's repertory. While fee percentages for per-program licenses are generally higher than those for blanket licenses, such a percentage is exacted from the revenues for only those programs that make use of ASCAP music.[16]

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[9] A. Latman & R. Gorman, *supra* note 8, at 419. *See also* 2 Nimmer on Copyright § 8.19, at 8-238 (1983).

[10] ASCAP is prohibited from obtaining an exclusive right to license performance rights. United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595, at 63,752 (S.D.N.Y. 1950).

[11] ASCAP and BMI acquire and license only small or nondramatic performing rights as distinguished from grand or dramatic performing rights in copyrighted music. A dramatic performance is defined as "a performance of a musical composition in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action." ASCAP Television License, *quoted in* S. Shemel & M. Krasilovsky, *supra* note 3, at 177. Dramatic or grand performances of copyrighted music are likely to be less frequent and easier for the copyright owner to license directly.

[12] Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 277 (S.D.N.Y. 1982).

[13] *See infra* note 57 and accompanying text.

[14] For example, the fee for radio stations is slightly less than two percent of the stations' adjusted advertising revenues. S. Shemel & M. Krasilovsky, *supra* note 3, at 163. Local television broadcasters are also charged a percentage of their adjusted advertising revenues. Fees for other users are based upon different measures of the users' gross receipts. For bars and nightclubs, fees vary depending on drinking prices, seating capacity, and admission charges; for hotels and motels, fees vary depending on entertainment expenses; and for concert halls, fees vary depending on admission prices and seating capacity. While most fees are based upon a percentage of gross receipts, some users are charged flat fees. For example, each of the three major television networks negotiates flat license fees with both organizations, largely because the parties involved have been unable to agree on accounting procedures for computing the networks' incomes. A. Latman & R. Gorman, *supra* note 8, at 455.

[15] S. Shemel & M. Krasilovsky, *supra* note 3, at 163. Even for network fees based upon

Fees collected by ASCAP become part of a single common fund that is divided equally between publishers' and writers' member groups.[17] These groups in turn distribute royalty payments to individual members, based either on the number of performances of the member's works or on a complex "spreading of payments" formula.[18]

Until 1939, ASCAP was the sole American performing rights society. In 1939, broadcast station owners formed BMI to counter what they perceived to be ASCAP's exorbitant licensing fees and unacceptable practices.[19] ASCAP and BMI remain the leading performing rights societies in the United States.[20]

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flat rates, the amount paid for blanket licenses does not vary with the quantity or quality of music each network chooses to use.

[16] Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 288-89 (S.D.N.Y. 1982).

[17] S. Shemel & M. Krasilovsky, *supra* note 3, at 163.

[18] *Id.* at 168. The blanket licensing revenues collected by ASCAP are distributed to individual copyright owners according either to a credit system which accounts for the number and type of performances of each composition (for composers and publishers) or to a more complicated credit formula which also accounts for the performance history of the work (an option available only to composers). *Id.* at 168-70. Under either formulation, special credit value is granted for some purposes to certain "qualified works" which have accumulated a certain number of feature performances. *Id.* at 170-71. BMI's blanket licensing revenues are distributed under similar formulas with one exception: BMI members are granted additional compensation once their composition's cumulative performances exceed a specified level. *Id.* at 171-73. In both cases, the distribution of revenues is conducted pursuant to each organization's monitoring of licensees' performances by such devices as taping television broadcasts, examining radio station logs and checking the programs of nonbroadcast licensees. Since it would not be feasible to attempt to monitor all licensees' performances, each organization surveys samples from which estimates of total national performances are derived. *Id.* at 165-66; Note, *Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act*, 55 Notre Dame Law. 729, 730 n.12 (1980) [hereinafter cited as Note, *Blanket Licensing*]; Note, CBS v. ASCAP: *Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 787 n.27 (1978) [hereinafter cited as Note, *Performing Rights Societies*].

Each organization also actively polices the performances of nonlicensees in order to detect unauthorized public performances of their members' works and initiate infringement proceedings when appropriate. For antitrust analysis purposes, both organizations have been treated as identical by the courts. *See, e.g.*, CBS v. ASCAP, 562 F.2d 130, 132 n.1 (2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, 441 U.S. 1 (1979).

[19] A. Latman & R. Gorman, *supra* note 8, at 455-56; *see also* S. Shemel & M. Krasilovsky, *supra* note 3, at 163.

[20] A number of smaller, privately owned performing rights organizations exist which also license public performances of music. The most important of these is the Society of European Stage Authors and Composers, Inc. (SESAC), containing approximately 300 publisher and several hundred writer affiliates. Its operations are similar to those of the two larger organizations. S. Shemel & M. Krasilovsky, *supra* note 3, at 164-65.

II

THE NECESSITY AND ADVANTAGES OF BLANKET LICENSING

A. Reduced Transaction Costs

The primary value of having a single organization license the bulk of music performing rights under a blanket scheme is that such an organization can substantially reduce transaction costs. Individually licensing performance rights for millions of musical compositions in separate transactions between thousands of copyright owners and music users would engender enormous transaction costs. These costs would be generated by the difficulties and complexities associated with the identification and location of individual copyright owners, the exchange of information about prices and performance opportunities for each composition, and the negotiation of separate licensing contracts before a composition could be performed. These transaction costs may often in fact be greater in amount than the actual license fees involved in such transactions. Taken collectively, the cost of individual transactions becomes staggering because of the sheer number of transactions that would be necessary. It has been estimated that there are now over one billion licensed performances of ASCAP music annually.[21]

1. Identification Costs

Potential licensees of a given musical work may find it difficult to identify and locate the copyright owner who can authorize public performances. These difficulties are compounded by the fact that most users wish to license performance rights from many copyright owners. As a result, many such users (especially proprietors of small establishments) might decide that the costs associated with obtaining a license would outweigh the benefits to be gained from the transaction. To avoid wasting money and effort, these users might refrain from performing certain works altogether or might resort to doing so illegally. A general clearing agency handling a large selection of music eliminates the chaos and expense associated with individual licensing. Users need only approach ASCAP or BMI to negotiate licenses for all the music they wish to perform.[22]

2. Information Costs

Without a central agency, individual negotiations for music rights would be complicated by the expense and difficulty of obtaining the information necessary to negotiate a price for a given performance right. Because the value of music performance rights is largely a function of the performance itself and therefore varies according to audience size, type of use, and number of performances rendered, the parties must have access to such information in order to negotiate prices. Since most licenses are negotiated before a performance is actually rendered, composers and users are forced to estimate the price and value of their performance rights. These estimates are based upon little more than generalized information concerning a licensee's use of music, the parties' subjective notions of a composition's "worth," and premature indications of its popularity. The difficulty of assessing performance variables and pricing performing rights based on speculative information and the disagreements that would inevitably arise in the course of licensing negotiations would substantially add to the costs of individual licensing transactions. Even if the parties were to base their negotiations on prices charged for similar performances, information costs would still be generated as such prices would vary according to the popularity of a particular composition. Again, the number of such assessments and transactions would make the individual licensing of music performance rights prohibitively expensive.[23]

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[21] Note, *Performing Rights Societies*, *supra* note 18, at 786 (citing J. Dean, The ASCAP Survey: Its Design and Objectives (1963) (unpublished pamphlet)).

[22] *See* S. SHEMEL & M. KRASILOVSKY, *supra* note 3, at 168.

In contrast, the blanket license circumvents the difficulties and expense associated with individual licensing transactions. It provides an efficient system for determining the value and price of music performance rights based upon the benefit actually conferred by the licensed music. The price of the blanket license is measured by a percentage of the gross revenues of the licensee, such that the compensation remitted by the user is based roughly on the size of the audience actually listening to the performance.[24] Different categories of users are assessed different percentages of revenues as licensing fees.[25] Additionally, the fees ASCAP collects for its blanket licenses are distributed among members based on a formula[26] that accounts for, among other things, the type of use made of the composition and the number of times it was performed.[27] An efficient system of blanket licensing where the compensation paid by users and received by copyright owners is based on an objective measure of the value of public performances thus reduces the information costs associated with individual licensing.[28]

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[23] Proponents of source licensing have submitted that its use in licensing motion picture theatrical performing rights pursuant to the court's decision in Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948), indicates that copyright owners can estimate the value of their performing rights without substantial difficulty. While the prices for synchronization and theatrical performing rights licenses are considerably higher than those for synchronization rights licenses only, Cirace, CBS v. ASCAP: *An Economic Analysis of a Political Problem*, 47 FORDHAM L. REV. 277, 295 n.114 (1978) (indicating that owners and producers recognize that performing rights have some value), there is no indication that the prices set for theatrical performance rights are based upon anything more than speculation and conjecture.

Although the price of synchronization rights would probably be zero in many instances if it were not for "nuisance value," *see id.*, the time and negotiations involved in synchronization rights and threatrical synchronization and performance rights transactions are brief and uncomplicated. Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 284 n.22 (S.D.N.Y. 1982). This suggests that, apart from the futility of such efforts, copyright owners and music users do not even attempt to carefully assess future performances and assign values to performance rights based upon such estimates; but price such rights according to speculative notions of a performance's value in a given medium. In CBS v. ASCAP, 400 F. Supp. 737, 763 n.13 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, 441 U.S. 1 (1979), the district court noted that "the increased complexity of the performing rights transaction amounts to asking the producer about the nature of the intended use and passing on the information to the publisher." This suggests that theatrical performance rights are priced according to the same speculative processes that govern the valuation of synchronization rights.

3. Transaction Time Costs

Finally, in addition to eliminating the costs of separate licensing negotiations, the blanket license eliminates the transaction costs associated with the time consumed by such negotiations or comparable licensing processes. For example, many users, including concert promoters, nightclub owners, and broadcasters carrying "live" programming, do not know in advance which compositions are to be performed.[29] These users cannot rely upon prior authorization from individual copyright owners to preclude possible infringements, but instead require the access to entire repertories that blanket licenses provide. Moreover, the blanket license grants instant access to new and currently popular compositions that enter a society's repertory over the term of the license, thereby obviating time-consuming licensing transactions. Many users place substantial economic value on the ability to perform any music in the society's repertory at a moment's notice and on the avoidance of the time lag inherent in licensing negotiations.

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[24] The compensation is also paid by the actual user of the performing right rather than the producer of the feature, as would be the case under source licensing. This fact is especially significant where a producer hopes to release his product in a variety of media (e.g., theaters, network television, cable and syndicated television). The composer would be forced to guess in which medium his production would appear as well as to estimate the variables of each performance in setting a single price for the performing right to his composition. This may result in a producer's licensing a performing right for a medium in which his motion picture may never appear.

[25] For example, all-news or all-talk radio stations are charged a lower percentage of their advertising revenues for their blanket licenses because their use of music differs from that of other radio stations. *See also supra* note 14.

[26] Members have challenged ASCAP's royalty distribution procedures based on perceived inequities. *See, e.g.*, United States v. ASCAP, 442 F.2d 601 (2d Cir. 1971).

[27] *See supra* note 18.

[28] BMI v. Moor-Law, Inc., 527 F. Supp. 758, 767 (D. Del. 1982).

[29] *Id.* at 763.

B. *Reduced Copyright Enforcement Costs*

Apart from reducing the transaction costs associated with individual licensing negotiations, the blanket license substantially reduces the costs of protecting a copyright owner's statutory rights from infringement. Aside from the transitory nature of unauthorized performances of copyrighted music, two economic characteristics make their detection especially difficult and costly. Potential infringers may perform a copyrighted composition without leaving anything less for others to use.[30] Once the musical composition has been created, the marginal cost of additional use (i.e., of performances) is zero. Moreover, it is difficult for a copyright owner to exclude nonpaying users from performing his composition.[31] Once a work becomes known or distributed, it is difficult to prevent others from performing it. In both cases, the copyright owner's inability to control access to his performance right reduces the unauthorized user's risk of being detected.[32] It would be prohibitively expensive for an individual copyright owner to monitor the activities of all users not authorized to perform his work in order to guard against infringements.

A performing rights organization like ASCAP or BMI can accomplish this policing function much more efficiently than individual copyright owners acting independently. Its administrative apparatus consolidates the otherwise duplicative efforts of individual copyright owners, each monitoring the same user, into one effort that polices performances of all the compositions in its repertory. Because they offer performance rights under blanket licenses, ASCAP and BMI are able to further reduce monitoring costs by focusing on the activities of only those users not holding ASCAP or BMI licenses.[33] By comprehensively monitoring nonlicensees for such infringements, performing rights organizations like ASCAP and BMI operate to discourage unauthorized performances of copyrighted music.[34]

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[30] *Id.*

[31] *Id.*

[32] In this way, music performing rights exhibit the salient characteristics of what economists refer to as "public goods."

[33] While ASCAP also monitors the performances of its licensees to facilitate its distribution of royalties, it can often rely upon diaries or other forms of self-monitoring for such purposes. Because licensees operate under a blanket license, there is little incentive for such users to lie about their use of music. The cost of monitoring users is consequently insubstantial.

[34] Proponents of per-piece licensing have suggested that, at least for broadcast licensees, the surveys ASCAP already conducts for purposes of royalty distributions could also serve to police infringements. However, policing per-piece licensees to detect unauthorized performances would still involve additional costs. In BMI v. CBS, 441 U.S. 1, 21 (1979), the Supreme Court noted that "even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that . . . obviates the need for closely monitoring the networks to see that they do not use more than they pay for." It is unlikely that ASCAP could rely upon the broadcasters' records it uses for royalty distribution purposes if per-piece or per-program licensing became widespread.

Performing rights societies and blanket licenses allow copyright owners to take advantage of economies of scale in performance rights licensing and to spread identical transaction and enforcement costs over a large group for the mutual benefit of owners and users. Both users and copyright owners are also spared the difficult task of setting prices for different performances, with users obtaining "unplanned, rapid, and indemnified access" to a wide range of compositions.[35] In light of the prohibitive transaction and enforcement costs involved in individual licensing, the bulk marketing of music performance rights by a single organization would seem crucial to their exploitation.[36]

C. *Balanced Bargaining Power of User and Copyright Owner*

In addition to eliminating the transaction and enforcement costs that would otherwise substantially hinder the efficient exploitation of statutory performance rights, performing rights organizations neutralize the bargaining leverage many users would otherwise exert over individual composers. In particular, the blanket license provides the composer with some market leverage against the monopsony power[37] of the major licensees from whom he derives a substantial portion of his royalties. Without ASCAP and BMI, television networks could exploit their superior market positions vis-a-vis individual composers, taking advantage of the intense competition among composers desiring that their works be performed on network television.[38] By joining a collective organization that blanket licenses music performance

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Rather, ASCAP would have to directly monitor licensees' as well as nonlicensees' performances to detect unauthorized performances of its music, incurring additional costs. Moreover, it would have to monitor all non-television network licensees' performances instead of relying upon estimates drawn from sample surveys (as it does for royalty distribution purposes), again increasing its detection costs.

[35] *Id.* at 20.

[36] Other litigants have repeatedly asked the courts to require ASCAP to issue per-piece licenses such that licensees' fees would be directly related to their actual use of music. *See, e.g.*, United States v. ASCAP (*In re* Application of NBC), 1971 Trade Cas. (CCH) ¶ 73,491 (S.D.N.Y. 1970). Although a per-piece licensing system would not require users to locate individual composers, it would not eliminate the transaction cost justification for blanket licensing, for ASCAP would still be burdened with having to exchange information about prices and performance opportunities for each composition, and would still incur substantial costs in policing licensees for performances not authorized by the per-piece licenses.

The marketing advantages of blanket licensing have been recognized by American courts even in those decisions that have challenged the legality of blanket licensing under antitrust laws. *See infra* note 80 and text accompanying notes 59-60. These advantages have even been acknowledged by challengers to blanket licensing. In *CBS v. ASCAP*, CBS alleged in its complaint that direct licensing of performance rights was entirely infeasible since any attempt " 'to acquire such a large body of rights from [individual copyright proprietors] . . . would be wholly impracticable.' " 400 F. Supp. at 745.

[37] The term monopsony power refers to the power to demand unreasonable terms which concentrated buyers in a given market can exploit vis-a-vis sellers.

[38] 400 F. Supp. at 767.

rights,[39] an individual composer can counterbalance such market power to assure receipt of fair compensation.[40]

Even in a market where blanket licensing has been barred by law, economic necessity will encourage cartelization to approximate the marketing and bargaining advantages of performing rights organizations. The Harry Fox Agency,[41] which represents virtually every major music publisher [42] in the licensing of television synchronization rights[43] and theatrical synchronization and performance rights, illustrates the economic advantages of performing rights societies. The Fox Agency is not a blanket licensing society but an agent for the entire industry, and has not been subject to the same antitrust law challenges as ASCAP and BMI. Potential users of synchronization or theatrical performance rights are spared the costs of contacting and negotiating with individual copyright owners and need only contact the Fox Agency to license such rights. While licensing transactions are theoretically carried out between the individual user and the copyright owner, the Fox Agency—by virtue of its broad client base and the extensive authority it receives—is effectively able to set licensing fees for the entire industry. Parties are spared the costs of gathering information regarding performances and translating such information into a negotiated price. The Fox Agency's control over those performance rights markets from which ASCAP and BMI have been barred strongly suggests that some form of collective licensing is the most efficient and effective means of permitting copyright owners and users to take maximum advantage of statutory performance rights.[44]

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[39] Of course, a more direct solution to the problem of monopsony power would involve breaking up the monopsonist, in this case the networks. However, performing rights organizations should not be viewed as a solution to the problem of network monopsony power; rather ASCAP's bargaining leverage should be viewed as an advantage favoring blanket licensing. In other contexts, problems of unequal bargaining power have been solved by allowing workers to form labor unions exempt from antitrust liability. ASCAP can be viewed as a labor union for composers, providing some form of marketing leverage against users of copyrighted music.

[40] The need for such a collective organization to combat the monopsony power of major users was recognized by the European Economic Commission in a decision concerning *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA), the German performing rights organization. The Commission noted that "'some exploiters of musical material . . . [private radio and television broadcasters] occupy such a strong position on the market that it enables them completely to control authors and composers . . . .' Collecting society membership is . . . necessary in relation to . . . broadcasting rights, where copyright holders are up against powerful users of music . . . ." Commission Decision (82/204/EEC) of Dec. 4, 1981, relating to a proceeding under Article 86 of the EEC Treaty (IV/29.971—GEMA statutes), 25 O.J. Eur. Comm. (No. L 94) 12, 17 (1982), [1982] 2 Common Mkt. L.R. (CCH) 482, 491, *reprinted in* [New Developments] Common Mkt. Rep. (CCH) ¶ 10,357, at 10,771-14 (1982).

The potential abuse of monopsony power by television networks in this country was recognized by the district court in *CBS v. ASCAP*. A publishing company executive testified that if publishers were to license performance rights directly to television networks, "there would be a deluge of price-cutting bordering on the cutthroat nature that would lead to mutual self-annihilation." 400 F. Supp. at 767.

[41] *See infra* text accompanying notes 116-22.

[42] Copyright owners usually assign the rights in their works to publishing companies which in turn distribute a portion of licensing revenues back to the original owner.

[43] A synchronization right is the right to record copyrighted music on the soundtrack of a taped or filmed production.

III

ENFORCEMENT OF ANTITRUST LEGISLATION

While blanket licensing may be crucial for the effective exploitation of statutory copyrights, the virtual monopoly power it extends ASCAP and BMI to issue performance rights licenses may give rise to substantial abuse. ASCAP and BMI can exploit their bargaining advantage to insist that licensees remit excessive fees to acquire the right to perform any of the music in the societies' repertories. Accordingly, both the Government and private licensee groups have challenged blanket licensing under the antitrust laws, resulting in two major constraints upon ASCAP's and BMI's operations. First, the government antitrust actions have resulted in negotiated consent decrees that preserve the practice of blanket licensing but subject ASCAP and BMI to continual judicial supervision.[45] Second, as the result of actions brought by private user groups, ASCAP and BMI have been enjoined altogether from issuing blanket licenses to selected groups of music users. Blanket licensing has been struck down for motion picture theater owners and for local television broadcasters, but upheld for radio broadcasters and television networks.[46]

A. The Consent Decrees

In 1941, the Justice Department challenged the blanket licenses offered by both ASCAP[47] and BMI[48] as illegal restraints of trade, alleging that both organizations were able to impose arbitrary prices for their licenses through unlawful copyright pooling. Cases against both societies were resolved through the issuance of negotiated consent decrees. Subject to certain modifications made in subsequent amendments, these decrees continue to govern the operations of both organizations.

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[44] In Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 293-96 (S.D.N.Y. 1982), the court, while acknowledging the cost advantages of blanket licensing, found them to be less compelling in the context of licensing non-network television performance rights because of the feasibility of source licensing. *See infra* note 93. While source licensing may obviate part of the transaction cost rationale for blanket licensing because producers could obtain performing rights licenses at the same time synchronization licenses are negotiated, the parties would still incur substantial expense in estimating the value of their performing rights for a given use and exchanging such information with motion picture producers. More importantly, source licensing would not eliminate the need for a copyright owner to monitor a local station's programming to detect unauthorized performances of his music. In addition, the court paid insufficient attention to the transaction time cost savings for live or unplanned performances of music.

[45] *See infra* Section A of Part III.

[46] *See infra* Section B of Part III.

[47] United States v. ASCAP, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941), *amended*, 1950-1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

[48] United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966); United States v. BMI, 1940-1943 Trade Cas. (CCH) ¶ 56,096 (E.D. Wis. 1941).

The ASCAP decree, originally entered into in 1941[49] and amended in 1950,[50] was designed to limit ASCAP's market power under blanket licensing in several ways. Before 1941, users were unable to obtain licenses directly from ASCAP members, but were required to obtain performance rights from ASCAP under blanket licenses. The 1941 decree required ASCAP to offer per-program licenses[51] in addition to blanket licenses, and permitted ASCAP to license its members' compositions only on a nonexclusive basis. Individual ASCAP members thus retained the right to independently issue performance licenses for their own compositions.[52] However, ASCAP was nevertheless still able to exploit its market power by offering per-program licenses at unfair rates and by requiring its members to remit all self-negotiated licensing royalties to ASCAP for distribution among the general membership. Concern over this potential exploitation prompted the 1950 amendments to the consent decrees that required ASCAP to offer per-program licenses at competitive rates[53] and enjoined it from interfering with direct licensing by member composers.[54]

By assuring both direct and per-program licensing as feasible alternatives to blanket licensing, these amendments aimed to curb ASCAP's exploitation of its monopoly position under blanket licensing.[55] Other provisions of the amended decree were similarly aimed at limiting ASCAP's market power. The decree restrained ASCAP from issuing blanket licenses for terms of more than five years,[56] and from discriminating in licensing terms between users similarly situated.[57] Users were given recourse to the District Court for the Southern District of New York for a determination of a reasonable fee if they objected to the one offered by ASCAP.[58] However, although the amended decree substantially reduced ASCAP's market power to issue performance licenses, it did not disturb the practice of blanket licensing itself. ASCAP was not required to issue nonblanket licenses covering only portions of its repertory.[59] In fact, ASCAP may license individual compositions only if the copyright owner has been notified of the applicant's request and has agreed to the individual license.[60]

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[49] United States v. ASCAP, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

[50] United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

[51] United States v. ASCAP, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941). Under a per-program license, a user receives access to all of the compositions in ASCAP's repertory in exchange for either a flat fee for each program in which ASCAP music is performed or a percentage of the advertising revenues received from such programs. In either case, compensation is not based upon revenues from programs which do not feature compositions in the ASCAP repertory or which contain music licensed directly from the copyright owner. Because ASCAP must carefully monitor all of the licensee's broadcasts (especially those not covered by the terms of the license) to detect infringements, the per-program license involves more extensive reporting obligations than does blanket licensing. *See* Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 282 (S.D.N.Y. 1982).

[52] United States v. ASCAP, 1940-1943 Trade Cas. (CCH) ¶ 56,104, at 405 (S.D.N.Y. 1941).

[53] United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595, at 63,753-54 (S.D.N.Y. 1950). The requirement that ASCAP offer a genuine economic choice between a blanket or per-program license was included primarily for the benefit of those broadcasters with relatively few commercial announcements and a greater percentage of sustained programming.

[54] *Id.* at 63,752.

[55] Garner, United States v. ASCAP: *The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT SOC'Y 119, 124 (1976). Despite the issuance of the amendments, neither per-program nor source licensing has been extensively pursued as an alternative to

BMI's consent decree, originally entered into in 1941[61] and amended in 1966,[62] imposes conditions similar to those governing ASCAP, but with two important exceptions. First, BMI is not enjoined

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blanket licensing, except in those markets where courts have prohibited ASCAP from issuing blanket licenses. *Id.* at 138; Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 288 (S.D.N.Y. 1982).

56. United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595, at 63,752 (S.D.N.Y. 1950).

57. *Id.* Discrimination between licensees did not encompass differences based upon applicable business factors which justified different licensing terms. Garner, *supra* note 55, at 124. Prior to the decree, ASCAP had exploited its market power by withholding portions of its repertory to exact higher fees from users.

58. Garner, *supra* note 55, at 119, 126. Users were permitted to use any music covered by their pending applications until a reasonable fee could be determined. While applicants have invoked the ratesetting authority of the Southern District on a number of occasions, the court has never reached the merits of such a request. Rather, the parties have always been able to agree on a proper fee through private negotiations subsequently approved by the court. *Id.* at 127-28. The court's power to dictate license terms probably encourages both users and ASCAP to act reasonably in negotiating blanket licensing fees. *Id.* at 149.

59. Because the 1950 decree allowed potential licensees to make written requests to ASCAP for use of "any, some or all of the compositions in the ASCAP repertory," United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595, at 63,754, and authorized the court to determine reasonable fees pursuant to such requests, broadcasters have contended that ASCAP was required under the decree to grant licenses not expressly authorized by its terms (i.e., other than blanket or per-program licenses). Such claims have been rejected by the courts. *See, e.g.*, United States v. ASCAP (*In re* Application of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2d Cir. 1964), *cert. denied*, 377 U.S. 997 (1974) (Southern District's fee-setting authority is concerned only with how fees are to be set for licenses ASCAP is required to grant under terms of decree).

60. United States v. ASCAP (*In re* Application of NBC), 1971 Trade Cas. (CCH) ¶ 73,491 (S.D.N.Y. 1970). In both *Shenandoah Valley* and *NBC*, the respective applicants had petitioned the court for licenses based upon the nature of their uses and number of performances broadcast. It is not clear how such per-use licenses would by themselves check abuses of ASCAP's monopoly power. While licensing fees would presumably reflect actual uses of music, such fees would still be influenced by ASCAP's ability to withhold portions of its repertory to exact higher prices and by its purported ability to fix prices.

61. United States v. BMI, 1940-1943 Trade Cas. (CCH) ¶ 56,096, at 382 (E.D. Wis. 1941).

62. United States v. BMI, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966).

from obtaining exclusive licensing authority from its affiliates.[63] Second, BMI licensees must resort to arbitration procedures rather than judicial determinations of reasonable blanket licensing fees in the event of a licensing dispute.[64]

B. Private Antitrust Actions

Notwithstanding two decades of governmental regulation of performing rights societies through the enforcement of the consent decrees, certain groups of licensees remained dissatisfied. Several of these groups initiated private antitrust actions challenging ASCAP's anticompetitive practice of issuing single-fee blanket licenses. These private actions upheld blanket licensing for certain groups of users (radio broadcasters, television networks) but not for others (motion picture exhibitors, local television broadcasters).

1. Motion Picture Exhibitors

In *Alden-Rochelle, Inc. v. ASCAP*,[65] motion picture exhibitors contended that ASCAP's exclusive control over the performing rights to musical works prevented members from licensing such rights directly to either theater owners or movie producers and therefore compelled the exhibitors to obtain blanket licenses on ASCAP's terms.[66] The court ruled that ASCAP represented an unlawful combination in restraint of trade because it had the power to fix prices and exclude potential competition.[67] As a result of the court's ruling, ASCAP was prevented from issuing blanket motion picture performance licenses to motion picture exhibitors.[68] Motion picture performance rights were thereafter licensed directly to motion picture producers by copyright owners.[69] Thus, motion picture exhibitors are currently exempt from having to obtain blanket performance licenses in order to perform copyrighted works.

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[63] *Id.* at 83,325.

[64] *Id.* at 83,325-26.

[65] 80 F. Supp. 888 (S.D.N.Y. 1948).

[66] ASCAP's exclusive right to license performing rights was reinforced by contractual provisions between motion picture distributors and exhibitors requiring theaters to have ASCAP licenses in order to exhibit films containing members' music. *Id.* at 894.

[67] *Id.*

[68] *Id.* at 903. The court restrained ASCAP from enforcing the motion picture performance rights of its members' musical compositions so long as it continued as an illegal combination and monopoly. In addition, its members were prohibited from enforcing motion picture performance rights of compositions for which synchronization rights had been granted to motion picture producers. These provisions were subsequently incorporated into the 1950 consent decree under which ASCAP operates. *See* United States v. ASCAP, 1950-1951 Trade Cas. (CCH) ¶ 62,595, at 63,752 (S.D.N.Y. 1950).

[69] The bulk of motion picture performance rights licenses are exchanged through the Harry Fox Agency, which represents most copyright owners in such transactions. *See infra* text accompanying notes 116-22.

2. *Radio Broadcasters*

In *K-91, Inc. v. Gershwin Publishing Corp.*,[70] several ASCAP members sued a Seattle radio station for copyright infringement. In defense, the station contended that the plaintiffs had misused their copyrights because ASCAP was an illegal combination engaging in price fixing in violation of the Sherman Act.[71] The Ninth Circuit affirmed the lower court's conclusion that ASCAP was not operating as a combination to restrain trade or as a monopoly because the 1950 consent decree prohibited it from engaging in activities that would violate the antitrust laws.[72] Because all applicants had the right to have the District Court for the Southern District of New York set a reasonable fee whenever they believed the rates proposed by ASCAP to be unfair, with ASCAP having the burden of proving the price reasonable, the court ruled that ASCAP was not guilty of price fixing. Further, because the decree provided that ASCAP's licensing authority was not to be exclusive, the court held that the rights of individual copyright owners and licensees to make their own nonblanket licensing arrangements had been preserved.[73] In the court's view, the decree had "disinfected" ASCAP as a potential combination in restraint of trade. So long as it complied with the provisions of the consent decree, ASCAP's practices would not fall within the purview of antitrust prohibitions with respect to the radio broadcast industry.[74]

3. *Television Networks*

In *CBS v. ASCAP*,[75] a television network sought to enjoin the practice of blanket licensing as an unlawful restraint of trade under the Sherman Act. CBS alleged that ASCAP used its market leverage to insist that CBS pay royalties for music it did not wish to license,[76] and sought to have ASCAP either enjoined from issuing network performance licenses, or alternatively, to require ASCAP to charge predetermined sums for each perfomance of copyrighted music.[77] The District Court for the Southern District of New York held that CBS had not met its burden of proving that ASCAP had illegally compelled it to accept a blanket license.[78] The court ruled that CBS had failed to demonstrate that the direct licensing permitted under the consent decree was not a viable alternative to blanket licensing.[79]

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[70] 372 F.2d 1 (9th Cir. 1967).

[71] *Id.* at 2.

[72] *Id.* at 4.

[73] *Id.*

[74] *Id.*

[75] 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, 441 U.S. 1 (1979).

[76] 400 F. Supp. at 745.

[77] *Id.* at 741.

The Court of Appeals for the Second Circuit reversed, holding that ASCAP's blanket license was a per se violation of the Sherman Act.[80] Blanket licensing constituted illegal price fixing, the court reasoned, because it set one price for all musical compositions and thereby eliminated all price competition among ASCAP members.[81]

The Supreme Court reversed the appellate court's ruling that the blanket license was a per se violation of the Sherman Act.[82] The Court distinguished the price fixing at issue from the horizontal arrangements traditionally labeled per se violations.[83] The Court emphasized that all three branches of Government had examined blanket licensing and had acknowledged its utility.[84] After concluding that the unique market conditions of musical performing rights necessitated blanket licensing,[85] the Court remanded the case to the court of appeals for a determination of whether blanket licensing represented an unreasonable restraint of trade under the Sherman Act. On remand,[86] the Second Circuit found that blanket licensing survived the rule of reason standard[87] announced by the Supreme Court. Customer preference for blanket licenses rather than such licenses themselves was held responsible for any restraint upon potential competition among compositions.[88]

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[78] *Id.* at 779.

[79] *Id.* The court also noted that the lawsuit followed a breakdown in negotiations for a renewal by CBS of its blanket license from BMI and concluded that CBS had "sought a legal solution to what is essentially a business problem." *Id.*

[80] 562 F.2d at 140.

[81] *Id.* at 136. However, the court qualified its condemnation of the blanket license in two important ways. First, it found that the difficulty of individually licensing performing rights sometimes compelled a finding that price fixing under the blanket license was lawful. While the blanket license was a "market necessity" for radio broadcasters and therefore tolerable despite its price-fixing implications, the existence of an alternative system of direct licensing for network television performing rights meant that blanket licensing in this context did not meet the requirements for this "market necessity" exception. *Id.* at 137-38. Moreover, rather than enjoining ASCAP from the "illegal" practice of blanket licensing television network performance rights altogether, the court remanded the case to the district court with instructions to fashion a remedy ensuring that the blanket license would not affect direct licensing practices. *Id.* at 140.

[82] 441 U.S. at 2.

[83] The Court found that the blanket license constituted not a simple horizontal arrangement between copyright owners, but a different product "of which the individual compositions are raw material." *Id.* at 21-22. The court also noted that the "individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." *Id.* at 23-24.

[84] Under the 1950 consent decree, both the executive and judiciary had scrutinized blanket licensing, imposed restrictions upon its use, and stood ready to provide further remedies against anticompetitive practices. The Justice Department had also specifically endorsed the need for " 'some kind of central licensing agency by which copyright holders may offer their works in a common pool' " in an amicus brief submitted in the *K-91* case. *See* BMI v. CBS, 441 U.S. 1, 14 (1979) (quoting Memorandum for United States as Amicus Curiae on Petition for Writ of Certiorari at 10-11, K-91, Inc. v. Gershwin Publishing Corp., 389 U.S. 1045 (1968) (No. 67-147)). The brief concluded that blanket licenses to individual radio stations were neither a per se violation of the Sherman Act nor an unreasonable restraint of trade. *Id.* at 15. The amicus brief submitted by the Justice Department in *BMI v. CBS* similarly indicated that the blanket license was not a per se violation of the Sherman Act in the context of network television. *Id.* Finally, Congress had chosen to enact compulsory licensing for performances of copyrighted music by secondary cable transmission systems and jukeboxes, specifically exempting ASCAP from antitrust liability for these purposes. *Id.* at 15-16 (citing 17 U.S.C. app. §§ 111(d)(5)(A), 116(c)(4), 118(b) (1982)).

4. *Local Television Broadcasters*

In *Buffalo Broadcasting Co. v. ASCAP*, the most recent challenge to the legality of blanket licensing, the court struck down the blanket licensing of performance rights to local television broadcasters under a two-part rule of reason analysis. First, the court distinguished *CBS* by noting that, unlike the networks, local television stations did not have the market power to compel either direct licensing of performing rights by copyright owners on an individual basis, or source licensing[89] of such rights by motion picture producers.[90] The absence of realistic marketing alternatives or potential competition outside the blanket license indicated that it was the blanket license itself rather than customer preference for that license that restrained competition for the licensing of performing rights.[91]

Second, the court concluded that the blanket license unreasonably restrained the licensing of music performing rights to local broadcasters because its procompetitive advantages were outweighed by its anticompetitive effects.[92] The court found that many of the acknowledged advantages of the blanket license were not applicable to the context of non-network television.[93] Against this, the court noted that the blanket license "prevents price competition between and among the pooled compositions" and that "[r]ealistic [licensing] alternatives offering potential competition and consequent price restraint do not exist."[94] The court enjoined ASCAP from continuing to issue blanket licenses to local broadcasters in order to effect the licensing of non-network television performing rights at the source, where individual negotiations between producers and copyright owners for synchronization and performing rights would encourage price competition between musical compositions.[95] The court's findings were restricted to the context of non-network television performing rights such that the blanket license presumably remains legal vis-a-vis other users of copyrighted music.[96] Thus, under the rule of reason analysis announced in *CBS* and applied in *Buffalo Broadcasting*, it appears that a court can prohibit blanket licensing where it finds that doing so would promote price competition between composers for the licensing of performance rights.

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[85] After emphasizing the impracticability and expense involved in setting up an intricate schedule of fees and uses for individual compositions, conducting individual sales transactions and monitoring, and policing all users to detect infringements, the Court concluded that the blanket license "accompanies the integration of sales, monitoring, and enforcement [of performing rights] against unauthorized copyright use." *Id.* at 20. The Court reasoned that to declare marketing arrangements reasonably necessary to effectuate the rights granted to copyright owners under the 1976 Copyright Act to be per se violations of the Sherman Act would severely constrain the commerce anticipated by the former and protected by the latter for the licensing of performing rights. *Id.* at 19.

[86] 620 F.2d at 930.

[87] Under the rule of reason standard for antitrust liability, a court will condemn a contract, combination or conspiracy whose purpose or likely effect is to significantly restrict competition. In making such determinations, courts must look to both the adverse and beneficial effects of the practice involved and determine, on balance, whether the "restriction imposed substantially impedes competition." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 68, at 188 (1977).

[88] 620 F.2d at 935.

[89] The term "source licensing" refers to the practice of motion picture producers to license performing rights directly from copyright owners at the same time synchronization rights are secured. Under the *Alden-Rochelle* decision, the licensing of theatrical motion picture performing rights takes place at the "source." However, the motion picture producer does not seek a license for subsequent television performances.

[90] 546 F. Supp. at 290, 292-93. The court also found the per-program license, which the 1950 consent decree required ASCAP to offer at competitive rates, to be an unrealistic alternative because of high costs and onerous reporting requirements. *Id.* at 289.

[91] *Id.* at 293.

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[92] *Id.* at 296.

[93] The court examined four of the acknowledged advantages of blanket licensing in the context of local television broadcasters. First, it found the blanket license's transaction cost savings to be negligible because the performance rights for most of the stations' programming could be licensed at the source when the producer negotiated for other music rights, without significant complications or increases in transaction costs. The court also acknowledged that the blanket license resulted in transaction cost savings for live syndicated programming and locally produced programming, but found such programming (and the consequent cost savings) to be insignificant. *Id.* at 294-95. Second, the court found the elimination of monitoring costs under the blanket license to be irrelevant as source licensing itself eliminated the need for a monitoring system to either distribute royalties or detect infringements. *Id.* at 295. Third, the court found that because it was unlikely that the additional costs of obtaining music performing rights at the source would deter producers from producing motion pictures, the asserted benefit of the blanket license in reducing up front costs for producers was negligible. *Id.* Finally, the court found that the flexibility offered to users under the blanket license was unimportant because the vast majority of the broadcasters' programming used preplanned music. The court considered any constraints in the use of music in live syndicated programming, locally produced programming, or for unplanned performances such as concerts or parades resulting from such loss of flexibility to be insignificant. *Id.* at 295-96.

[94] *Id.* at 293.

[95] *Id.* at 296.

[96] BMI is also prohibited from issuing blanket performance licenses to motion picture exhibitors and local television stations pursuant to the *Alden-Rochelle* and *Buffalo Broadcasting* decisions, respectively.

IV

THE INAPPROPRIATENESS OF ANTITRUST REGULATION OF PERFORMING RIGHTS SOCIETIES

Without some supervising authority, ASCAP could exploit its monopoly powers under blanket licensing to force users to accept unreasonable licensing conditions or to effectively preclude them from using any of the music in ASCAP's repertory. Regulation of performing rights societies through application of the antitrust laws, however, is ineffective in restraining such abuses. Dissatisfied users are compelled either to challenge the entire practice of blanket licensing or to rely on judicial enforcement of consent decrees limiting ASCAP's and BMI's unfair marketing practices. Both courses of action fail to control abuses of monopoly bargaining power.

Antitrust litigation is generally expensive, uncertain, and time consuming. Courts often cannot impose the remedies best suited to the goal of regulation—controlling abuses of market power. Antitrust enforcement is also constrained by the inability of the judiciary to enforce the remedies it imposes or to supervise performing rights societies adequately. These factors severely limit the effectiveness of both private antitrust litigation and consent decree enforcement as mechanisms for controlling the bargaining power of ASCAP and BMI. The most critical problem with antitrust enforcement, however, is that the goal of such regulation, namely, the promotion of reasonable rates through the introduction of price competition,[97] is inappropriate and misguided in a market where price seldom affects the desirability of a composition.

A. The Limitations of Antitrust Remedies

1. Private Antitrust Challenges

Three factors operate to limit the effectiveness of private antitrust actions in preventing performing rights organizations from abusing their monopoly powers. First, because antitrust actions often involve extensive and expensive litigation, such recourse is limited to users who can afford it. The *CBS* case, for example, took eleven years to litigate. Both defendant organizations incurred substantial litigation expenses as well as significant revenue losses.[98]

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[97] Though antitrust laws are often aimed at goals other than promoting price competition, courts have nonetheless used them as regulatory mechanisms to promote price competition for performance rights. *See, e.g.*, Buffalo Broadcasting Co. v. ASCAP, 546 F. Supp. 274, 296 (S.D.N.Y. 1982).

[98] From 1970 through 1980, CBS's license with ASCAP was frozen pending the outcome of the litigation and was only recently readjusted retroactively to account for inflation and the network's own revenue increases during that period. ABC's ASCAP license has also been frozen since 1976 and the parties have yet to agree upon proper retroactive adjustments. *See* United

Second, the thrust of antitrust regulation is weakened by the inability of the judiciary to frame appropriate remedies. Successful antitrust challenges can prevent ASCAP and BMI only from issuing blanket performance licenses and not necessarily from demanding unreasonable terms from users seeking to secure music performance licenses. Litigants who, because of transaction-cost advantages, may want to continue to license performance rights under blanket schemes but who nevertheless object to the terms under which such licenses are offered cannot secure relief pursuant to private antitrust actions. The inadequacy of the judicial remedy becomes apparent when the results of successful antitrust actions are considered: rather than compelling societies to issue blanket licenses at reasonable prices, courts exempt theater owners and local broadcasters from securing performance rights licenses altogether.

Third, antitrust enforcement creates inequities based upon the inconsistent application of antitrust laws by different courts. As discussed in the preceding Part, contradictory decisions have been rendered in antitrust challenges by different groups. As a result of these disparate opinions, select groups of users need not secure performance rights licenses. Unsuccessful litigants, however, must continue to secure blanket licenses, relying only on the consent decrees to control abuses of monopoly powers.[99]

2. *Enforcement of Consent Decrees*

The provisions of the consent decrees strive to provide an alternative to antitrust litigation for those dissatisfied with the licensing fees set by a performing rights society. However, the provisions are unavailable to most users as protections against the market power of ASCAP and BMI.

Although users who are dissatisfied with ASCAP's blanket licensing fees may apply to the District Court for the Southern District of New York for determinations of reasonable fees,[100] judicial fee determinations can often involve the same expense, delay, and frustration that plague private antitrust actions and that discourage all but the

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States v. ASCAP, 1981-1983 Copyright L. Dec. (CCH) ¶ 25,401, at 17,314 (S.D.N.Y. 1982). BMI's license with CBS was frozen in 1972 pursuant to the pending litigation and was adjusted upward to reflect inflation and CBS's increased revenues only in 1980 and not on a retroactive basis. CBS v. ASCAP, 483 F. Supp. 616 (S.D.N.Y. 1980).

[99] Because certain groups of users in this country are exempt from blanket licensing, fiscal difficulties between ASCAP and foreign performing rights organizations have emerged. For example, one commentator notes that ASCAP's inability to collect fees for motion picture performances in American theaters has created an "imbalance . . . between ASCAP and its sister societies in Europe which has proved, and continues to prove, a source of friction." Wallace, *Control over the Monopoly Exercise of Copyright*, 4 INT'L REV. INDUS. PROP. & COPYRIGHT L. 380, 381 (1973).

[100] *See supra* note 58 and accompanying text.

largest and most persistent users.[101] There are also similar concerns with having disparate decisions rendered by different judges of varying experience and expertise. The cost and uncertainty associated with judicial fee setting seems to have discouraged parties from invoking such remedial powers. The Southern District, for example, has never had to make a final determination of what constitutes a reasonable blanket licensing fee.[102] Moreover, the court's jurisdiction is strictly limited[103] and does not extend to users who object to licensing conditions other than the fees exacted or who wish to have a reasonable fee determined for a nonblanket license.

While under both consent decrees, users may either obtain per-program licenses from ASCAP and BMI,[104] or license performance rights directly from the copyright owner,[105] the transaction, enforcement, and cost advantages of blanket licensing make these alternatives unattractive.[106] No provision is made in the decrees for judicial control of the prices charged for such licenses,[107] and it is unclear that the judiciary would be capable of conducting such supervision even if given the necessary authority. As a result, the bulk of nondramatic theatrical music performance rights continue to be licensed under blanket schemes.[108]

The decrees also include specific conditions with which ASCAP and BMI must comply when issuing blanket licenses, but which are nevertheless difficult to enforce. For example, ASCAP is prohibited from discriminating against similarly situated licensees when issuing blanket licenses.[109] Since private litigants are considered nonparties to the consent decrees, a licensee claiming to be similarly situated to another must rely on the judiciary or the Government to enforce this provision. As an institutional body, the judiciary does not have the capacity to supervise performing rights organizations continually in order to ensure compliance with decree provisions. As a result of all these factors, enforcement of the consent decrees is at best a limited mechanism for protecting users against abuses of monopoly powers by performing rights societies.

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[101] For example, in proceedings initiated by ABC and ASCAP to fix an interim license fee pursuant to the amended final judgment in *CBS*, the court noted that the "supplemental papers submitted to this court have been voluminous and in some instances of doubtful relevance." United States v. ASCAP, 1981-1983 Copyright L. Dec. (CCH) ¶ 25,401, at 17,315 (S.D.N.Y. 1982). While the court did set interim licensing fees pursuant to an amended final judgment, it has yet to make a determination of a reasonable fee pursuant to its authority under the 1950 Consent Decree. Thus, resort to the judiciary for determinations of reasonable fees would seem to involve considerable amounts of time and expense.

[102] Garner, *supra* note 55, at 127-28.

[103] *See supra* note 59.

[104] *See supra* note 53.

[105] *See supra* note 54.

[106] In addition, neither individual nor per-program licensing schemes prevent copyright owners from collectively exploiting their market power. Individual licensing would only facilitate the transfer of ASCAP's market power to the Fox Agency or a comparable organization. *See infra* text accompanying notes 116-22. Under per-program licensing, ASCAP would still be able to withhold the licensing of its repertory to exact unreasonable fees.

[107] Despite the decree's provisions that per-program licenses must be offered at rates which give licensees a genuine economic choice, the *Buffalo Broadcasting* court found per-program licensing fees to be seven times higher than those for blanket licenses. 546 F. Supp. at 289.

[108] *See supra* note 55.

[109] *See supra* note 57.

B. Price Competition in the Performing Rights Market

The most fundamental problem with antitrust regulation of performing rights societies is that the aim of such regulation—the introduction of price competition into the performing rights marketplace—is sorely misplaced. Price competition is ordinarily not a significant factor in the performing rights market, not because the monopoly of ASCAP and BMI on the market prevents competitive prices from emerging, but instead because price seldom affects a user's selection of a musical composition. As a result, artificial attempts to inject competition into the performing rights marketplace are unlikely to ensure that users can secure performance rights at reasonable costs.

Price differentials are unlikely to have a significant effect upon a purchaser's selection of music because of the unique quality of each musical composition or recording and because each listener exercises his esthetic preferences.[110] To a large degree, the user is attracted by the composer's name or the quality of the song, so that price considerations become secondary. Thus, within a wide range of prices, demand is relatively inelastic. At the same time, composers are unlikely to press for the highest performance fees they conceivably could earn. Composers are eager to license performances of their music, because public performances stimulate the more lucrative sales of phonograph records, prerecorded tapes, and sheet music, as well as interest in other such performances.[111] These factors significantly reduce the effect of price on the selection of copyrighted music.[112]

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[110] One commentator has noted:

> There may also be some reason to suspect that neither music users nor copyright owners will act as economic men in the licensing of performing rights. Whether price differential will play [a] significant . . . role in the competitive climate of music licensing . . . remains to be seen. Valuation is, of course, much easier in the homogenous commodity context where there is no reason to prefer one producer's oil, for example, to another's. But the listener's aesthetic preference or the composer's eagerness to have his work performed inevitably injects an element of irrationality into what is already an unpredictable market.

Case Comment. CBS v. ASCAP: *Who Calls the Tune? Performing Right Societies and the Rule Against Price Fixing*, 31 RUTGERS L. REV. 720, 757 (1978).

[111] *See infra* note 128.

[112] The analysis becomes even more complicated when one considers that the bargained-for

Price differentials would have only limited effects on a user's selection of music for other reasons. Many blanket licensees, especially concert halls, nightclubs, and other proprietors of live music, have little or no control over the music that will be performed there. Users such as radio stations and bars, which do exercise some discretion over the type of music to be played, would not be inclined to select cheaper, less popular compositions and risk alienating listeners and patrons, as the license fees saved would be trivial in comparison to the advertising and sales revenue lost. Even in the motion picture performing rights market, where compositions are interchangeable to a greater extent, it is unlikely that music would be selected based upon the cost of performing rights rather than the quality of the composition. Performing rights fees are insignificant in relation to overall production costs.[113] Directors, who generally select the music for a film, are less likely to be constrained by cost considerations than producers would be.[114] It is even more improbable that theater owners or television broadcasters would select the motion pictures they license from producers based upon the cost of the music contained in such features, as such costs are insignificant when compared to the amounts paid for the programming. In sum, the concept of price competition between separate compositions is foreign and inappropriate to a market in which the selection of works to be performed is more a function of the composition's quality and popularity than its price.

Current licensing practices reflect the fact that price competition would not significantly alter the preferences of users in negotiating for performance rights licenses. Those courts that have upheld challenges to the legality of the blanket license have envisioned a market where users select the works to be performed and the number of times they will perform them according to the price of the performance rights license for a given composition. For example, the *Buffalo Broadcasting* court assumed that the local television performing rights market upon

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price of a performing right is limited by the parties' abilities to gather relevant information on popularity and demand. It is even more difficult to conceive of price competition between compositions considering such imperfect information.

[113] For example, while a network may pay up to $200,000 for a one-hour episode of a dramatic serial, performance royalties for that program may amount to only $1500. *CBS*, 400 F. Supp. at 756.

The combined synchronization and performance rights license sells for between $250 and $20,000 per composition per picture. Cirace, *supra* note 23, at 295 n.114. The price for this type of license may increase so that the composition is less likely to be considered fungible. Producers willing to pay substantial amounts for rights to a given composition would be less willing to substitute another work.

[114] While *producers* may be concerned with cost minimization, it is unlikely that they would allow such considerations to constrain a director's selection of music as the costs involved are likely to be insignificant. Moreover, major producers often act as their own distributors, and therefore pass production costs on to exhibitors.

which it imposed the source licensing remedy was dominated by such price competition because the active negotiations between the parties licensing the performance rights indicated that users were seeking the best product at the lowest price.[115] However, the licensing of motion picture theater performance rights, which pursuant to the *Alden-Rochelle* decision are secured directly from copyright owners, indicates that neither composers nor users engage in significant economic bargaining when conducting such transactions.

The procedure for licensing motion picture performance rights usually begins when a producer contacts the Harry Fox Agency, expressing interest in licensing performance and synchronization rights to a musical work and providing information as to the use to be made of the composition.[116] After contacting the publisher, the Fox Agency quotes a price to the producer (almost always within two days), which is usually accepted (or rejected) on the spot.[117] In some instances, the Agency is sufficiently familiar with the publisher's fee schedule so that contact with the publisher is not necessary for it to quote a price.[118] Using a staff of two employees, the Fox Agency issues several thousand television synchronization and several hundred movie synchronization and performance licenses annually.[119] Hence, the procedure of licensing motion picture theater performance rights reflects a simple quotation/acceptance transaction rather than the competitive price negotiations envisioned by the *Buffalo Broadcasting* court.

The simplicity of performing rights licensing is even more apparent when compared with the licensing transactions for television synchronization rights that are also brokered by the Fox Agency. The prices charged for licensing television synchronization rights are usually between $50 and $150 per composition, with some evidence that in many instances this amount would be zero if not for "nuisance value."[120] Despite the facts that prices for performing rights are considerably higher, that the Fox Agency generally has more contact with the publisher when quoting a motion picture performance-synchronization licensing fee, and that the performance-synchronization license encompasses substantially more variables, the district court in *CBS* found synchronization and performance-synchronization rights transactions to be similarly uncomplicated.[121] These clear-cut transactions belie the "competitive negotiations" envisioned by the *Buffalo Broadcasting* court.

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[115] 546 F. Supp. at 283-84.

[116] *CBS*, 400 F. Supp. at 760.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Cirace, *supra* note 23, at 295 n.114.

[121] 400 F. Supp. at 763 n.13.

The power of the Fox Agency effectively to set a schedule of licensing fees also indicates that price competition among musical compositions is not an important factor in negotiations for performance rights. The *Buffalo Broadcasting* court suggested that the anticompetitive blanket license could easily be replaced by competitive negotiations for music performing rights between copyright owners and producers of locally televised programming. However, these publisher-producer transactions generally do not take place on an individual level, but are brokered almost exclusively through the Fox Agency. Since the Fox Agency does not bargain with individual licensees over fees but merely quotes prices for their subsequent acceptance or rejection, the licensing of performance rights at the source would not spur price competition for such commodities, but would merely transfer the monopoly power from one organization (ASCAP or BMI) to another (Fox).[122]

Certain other features of the motion picture performance rights market indicate that price competition is an ineffective means of regulating that market. Producers often engage "composers for hire" to score the background music for a film and arrange to have the copyright assigned to publishing companies which the producers control.[123] Price competition among compositions is not likely to be a factor determining which compositions will be used in the score, since generally the music written is entirely original. Moreover, since the copyright to the score has been vested in the producer's publishing subsidiary, there are no negotiations over the value of the performance rights.[124] With respect to works not made "for hire," many producers attempt to secure synchronization and performance rights only after the composition has been recorded onto film—again, price competition between compositions is unlikely to characterize the licensing process.[125]

While there is a need to regulate the activities of performing rights societies under blanket licensing to guard against unfair exploitation of bargaining power, this regulation should not be aimed, as some courts have suggested, at promoting price competition for the licensing of performing rights. The *Buffalo Broadcasting* court correctly distinguished its case from *CBS* on the grounds that local television stations lacked the bargaining power the network enjoyed to compel ASCAP to act reasonably in negotiating blanket licenses, but incorrectly sought to promote price competition for the licensing of performance rights rather than take direct measures to correct this imbalance.[126] The absence of price competition in the performing rights market nullifies any attempt to stimulate such competition as a means of ensuring that users can license performance rights at reasonable rates. The experience of the Fox Agency indicates that any ban of blanket licensing pursuant to antitrust enforcement is unlikely to lead to the price competition for performance rights that would provide users with relief against ASCAP's market power. In fact, in those markets where courts have chosen to ban ASCAP and its blanket license, its market power has merely been transferred to the Fox Agency, which can effectively set licensing fees throughout the industry.[127]

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[122] The power of the Fox Agency to effectively set licensing fees might encourage dissatisfied users to challenge its operations under antitrust laws despite its agency capacity. Should the Agency's operations be found to violate antitrust prohibitions, copyright owners and licensees would find it difficult to conduct individual licensing transactions for performance rights. Antitrust regulation of performing rights organizations depends on the existence of some organization like the Fox Agency to collectively license performance rights if ASCAP is enjoined from doing so.

[123] *CBS*, 400 F. Supp. at 755-56. Any increase in transaction costs resulting from the elimination of blanket licensing is also likely to cause motion picture producers to use the composer for hire more frequently, to the economic and professional detriment of current copyright owners.

[124] *Id.* at 756.

[125] In such cases, producers rarely encounter difficulty in obtaining performing rights licenses. *Id.* at 775-77.

Any ban of blanket licensing in response to successful antitrust litigation would eliminate the marketing and policy advantages of such practices which may be crucial to facilitate the licensing of public performance rights. Without the blanket license, transaction, enforcement, and marketing costs might prohibit users from licensing performance rights and deprive copyright owners of the full benefit of their statutory performance rights; users will either refrain from performing the works publicly or will perform them illegally. Copyright owners would be unable to detect such infringements because of prohibitive transaction costs. Rather than sacrificing the acknowledged advantages of blanket licensing in an awkward attempt to promote price competition,[128] the regulation of performing rights organizations

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[126] The absence of price competition for performing rights also suggests that the *Buffalo Broadcasting* court wrongly struck down the blanket license for local television broadcasters as an anticompetitive restraint of trade. Certain features unique to the performing rights market, rather than the blanket license, are responsible for restraining price competiton for performing rights. In light of the advantages of blanket licensing in the local television performance rights market, the court should have allowed such practices to continue.

[127] Of course, it cannot be assumed that the Fox Agency will broker the licensing of non-network television performing rights pursuant to the *Buffalo Broadcasting* decision. However, the existence of the Fox Agency indicates that copyright owners are likely to have such rights collectively licensed by a single agency because of the marketing cost advantages.

[128] It is interesting to note that despite the absence of price competition under blanket licensing, the market for licensing music performances remains extremely competitive because of the value of public performances to copyright owners. In *CBS*, the district court noted:

> Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because

should operate to preserve the practice of blanket licensing while ensuring that users have some protection against the monopoly powers of ASCAP and BMI.

V

AN ALTERNATIVE AGENCY MODEL

If antitrust laws are not used to control the activities of performing rights societies, some other means of regulating these organizations must be devised that would both permit blanket licensing and curb monopolistic abuses. Rather than encouraging price competition, such regulation should instead focus on the relative bargaining power of performing rights societies and their licensees. Several commentators have suggested that the United States establish a regulatory agency to oversee the practices and fees set by performing rights societies,[129] as other Western nations have done.[130] This Part describes the agencies that the United Kingdom and West Germany have established to regulate their respective performing rights societies.[131] It will be argued that if the United States were to establish an agency comparable to those in the United Kingdom and West Germany, such an agency would possess distinct advantages over antitrust enforcement.

A. The United Kingdom

In the United Kingdom, blanket licenses authorizing public per-

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> a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users.

400 F. Supp. at 770. Although the competition for performances in media other than network television may be less intense because the potential rewards are less lucrative, there is every indication that composers and publishers direct extensive promotional efforts towards such users and that their markets are similarly competitive. There is "no indication that, should the blanket license be abandoned, competition in any but the most abstract sense would be the victor." Comment, CBS v. ASCAP: *Who Calls the Tune? Performing Right Societies and the Rule Against Price Fixing*, 31 RUTGERS L. REV. 720, 757 (1978).

[129] *See, e.g.*, Note, *Blanket Licensing*, *supra* note 18, at 749; Note, *Performing Rights Societies*, *supra* note 18, at 802-03.

[130] *See* A. DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 212-37 (1978). The licensing of music performance rights abroad is orchestrated by a single organization in each country in contrast to the two which dominate licensing in the United States.

[131] Other European nations also use administrative agencies to check potential abuses of monopoly power by performing rights organizations. For example, the Netherlands performing rights organization, *Het Bureau voor Muziek-Auteursrecht* (BUMA) is subject to permanent supervision by the Minister of Justice. The Minister, acting through a government commission, is required to consult with users of musical works in performing his supervisory functions. *Id.* at 234-37. In Italy, the monopoly over performing rights of the *Società Italiana degli Autori ed Editori* (SIAE) is counterbalanced by a dual system of government supervision. Not only is SIAE subject to continuous supervision by the Presiding Committee of the Italian Society of Ministers, but its articles of association must be confirmed by a Presidential decree. *Id.* at 230-32. Even Luxembourg, which has no collecting societies of its own, subjects all such organizations operating within its borders to certain approval requirements. *Id.* at 232-34.

formances of copyrighted musical works are issued by the Performing Rights Society (PRS) pursuant to authority granted by member copyright owners.[132] Licensees or groups of users who are dissatisfied with PRS's fees or practices may apply to a Performing Rights Tribunal for review of the licenses offered.[133] British copyright law provides for two procedures under which the Tribunal may determine the suitability of the licenses. First, the Tribunal is empowered to review an entire licensing scheme[134] under a procedure known as a "reference."[135] The examination of a whole licensing scheme can be initiated by either a user interested in obtaining that type of license or an organization representing a group of potential licensees.[136] The Tribunal may either confirm or amend the particular licensing scheme for a definite or indefinite period of time.[137]

Second, British copyright law allows users to challenge the suitability of individual licenses within or outside a given scheme under a procedure known as an "application."[138] In an application, a user may allege that PRS has refused to issue a license under a given scheme or that a license outside such a scheme has been unfairly withheld or offered only on unreasonable terms.[139] As is the case with a "reference," outside organizations or persons with a substantial interest in the proceedings may be made parties.[140] If the Tribunal is satisfied with the evidence presented, it will grant the license under the relevant scheme or upon reasonable terms.[141]

The cost of invoking either form of Tribunal review is nominal, and the Tribunal may compel one party to defray the expenses of another party when appropriate.[142] The Tribunal's authority is most commonly invoked in the context of a rate-fixing exercise after the user and PRS have failed to negotiate a licensing fee.

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[132] The scope of the copyright owner's performing right under the Berne Convention (of which Great Britain is a member) is similar to that extended under American copyright law. Wallace, *supra* note 99, at 381. PRS issues blanket performance licenses covering all of the compositions in its repertory to movie theaters, television and radio broadcasters, and other traditional users of copyrighted music. It is the only such licensing organization in the United Kingdom. A. DIETZ, *supra* note 130, at 227-30.

[133] Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, §§ 23-30. Under British law, the Tribunal's jurisdiction extends only to organizations which grant "general licenses, each extending to the works of several authors"—i.e., the blanket licenses issued by PRS. *Id.* § 24(3). Performing rights licenses issued on an individual basis are not subject to the Tribunal's authority. *See* Wallace, *supra* note 99, at 384.

[134] Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 25(1). The term "licensing scheme" refers to a general type of license offered by PRS to a class of licensees. *Id.* § 24(4).

[135] *Id.* § 24(1)(a).

[136] *Id.* § 25(1).

[137] *Id.* § 25(5)-(6).

[138] *Id.* § 24(1)(b).

[139] *Id.* § 27(2)-(3).

[140] *Id.* § 27(4).

[141] *Id.* § 27(5). *See also* A. DIETZ, *supra* note 130, at 227-28.

[142] Wallace, *supra* note 99, at 385.

Because PRS operates as a virtual monopoly over the licensing of music performance rights in the United Kingdom, historically it, like ASCAP and BMI, has been subject to substantial scrutiny for potential abuses of monopoly power. When PRS was originally established in 1875, its accusations against infringers were countered by claims that PRS's operations represented an unlawful combination in restraint of trade. While courts generally absolved PRS of liability, the allegations drew the Government's attention.[143] The British Government, however, chose to rely upon compulsory arbitration procedures rather than the enforcement of antimonopoly laws to deal with potential abuses of PRS's monopoly power. It recognized that "[i]f such an association is to function effectively, it must obtain as near a super-monopoly as is possible of the monopolies conferred upon composers."[144] The Performing Rights Tribunal and the "reference" and "application" procedures were deliberately established "to provide a possibility of correction in the event of abuse of the monopoly position by the collecting societies."[145] Consequently, challenges to the legality of blanket licensing under antimonopoly laws have not been pursued as a means of regulating PRS's operations.

Several commentators have compared the effectiveness of the Performing Rights Tribunal with that of antimonopoly laws in controlling potential abuses of PRS's market power. One commentator has concluded that while it is in the public interest to accept performing rights monopolies, "anti-cartel laws are too blunt an instrument to use to control [such] monopol[ies]."[146] Regulation by the Performing Rights Tribunal, he observed, "on the whole . . . appears to work reasonably well."[147] Another commentator has concluded that there is "nothing in the American experience . . . to demonstrate . . . that the monopoly of the copyright societies is not in the public interest," and has recommended compulsory arbitration as an effective deterrent of monopolistic abuses.[148]

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[143] G. McFarlane, Copyright: The Development and Exercise of the Performing Right in Great Britain 161-62 (1980).

[144] *Id.* at 162 (citing Select Comm. of the House of Commons, Special Report on the Musical Copyright Bill (1930)).

[145] A. Dietz, *supra* note 130, at 229.

[146] Wallace, *supra* note 99, at 382.

[147] *Id.* at 386.

[148] G. McFarlane, *supra* note 143, at 184-85. A final commentator has noted that while "[t]here is undeniably a great similarity with supervision procedures under cartel law for guarding against abuses of monopoly positions . . . it is still important . . . that this special procedure . . . has been dealt with . . . within Copyright Law itself and has thus been given a special formula-

B. West Germany

Of all Western nations, West Germany has developed the most comprehensive system to regulate performing rights societies. Under German law,[149] any organization engaging in the joint exploitation of authors' rights is required to secure permission from the German Patent Office. Music performance rights are collectively licensed on an author's behalf by an organization known as the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA).[150] The German Patent Office maintains permanent supervision over GEMA,[151] and can revoke the organization's operating permit if GEMA fails to meet its legal obligations.[152]

GEMA is obliged by law to license performance rights upon equitable terms to anyone upon request,[153] to conclude blanket contracts on equitable terms with associations of users,[154] and to establish scales of fees that allow for certain special interests.[155] A special arbitration procedure has been established to resolve disputes in cases where GEMA is unable to conclude contracts with a user association or broadcasting company.[156] All of these provisions are geared toward preventing abuse of GEMA's monopoly position vis-a-vis users.[157]

Moreover, unlike the antitrust laws of other European nations, German cartel legislation continues to play a substantial role in regulating the operations of performing rights organizations. The German Patent Office must consult with the German Federal Cartel Office when determining whether to grant or revoke a performing rights soci-

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tion suited to the requirements of copyright . . . [which] would not have been possible . . . [under] cartel law alone." A. Dietz, *supra* note 130, at 229-300.

[149] *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten* (Law on the Administration of Copyright and Related Rights), in 1965 Bundesgesetzblatt [BGBl], Teil I (compilation of federal statutes and decrees) at 1294 (W. Ger.); *see also* A. Dietz, *supra* note 130, at 219.

[150] While GEMA is the only German organization licensing music performing rights, the laws discussed below also govern the operations of other German collecting societies which enforce other aspects of an author's copyright. A. Dietz, *supra* note 130, at 219-22.

[151] *Id.* at 220.

[152] *Id.* (citing Law on the Administration of Copyright and Related Rights, *supra* note 149, § 4, 1965 BGBl, Teil I at 1294).

[153] *Id.* (citing Law on the Administration of Copyright and Related Rights, *supra* note 149, § 6, 1965 BGBl, Teil I at 1295).

[154] *Id.* (citing Law on the Administration of Copyright and Related Rights, *supra* note 149, § 12, 1965 BGBl, Teil I at 1295-96).

[155] *Id.* (citing Law on the Administration of Copyright and Related Rights, *supra* note 149, § 13, 1965 BGBl, Teil I at 1296).

[156] *Id.* (citing Law on the Administration of Copyright and Related Rights, *supra* note 149, § 14, 1965 BGBl, Teil I at 1296).

[157] *Id.* at 221.

ety's permit.[158] Although GEMA has been exempted from anticartel prohibitions, it remains subject to the Cartel Office's supervision to guard against abuses of the market power acquired by such exemption.[159] Thus, unlike the antitrust laws in the United States, which are used to challenge the legality of ASCAP and its licensing practices, German anticartel laws provide the authority for an administrative body to oversee GEMA's operations and check specific abuses of its monopoly powers. One commentator has termed this dual supervision under German law "excessive," and has said that the supervisory authority of the Patent Office is "quite sufficient" to combat any adverse effects of GEMA's de facto monopoly.[160]

While GEMA is exempt from the antitrust prohibitions of German law, the European Economic Commission, pursuant to its authority under the Treaty of Rome, successfully challenged GEMA's legality in 1971.[161] The Commission alleged that because of GEMA's attempt to turn its dominant position over music licensing in West Germany into an absolute monopoly, competing societies could not survive.[162] In the Commission's view, "GEMA confused the necessity for collective management of performing rights with management by a single society which establishes and defends its exclusive position by improper means."[163] It believed that GEMA members should be free to assign their performing rights to other societies (either foreign performing rights societies or other German authors' rights societies) and to decide whether to withhold the administration of certain categories of rights from GEMA.[164] These findings compelled GEMA to alter its constitution and to cease the offending practices. GEMA is still permitted to issue blanket performance licenses covering all of its members' compositions.[165]

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[158] *Id.* (citing Law on the Administration of Copyright and Related Rights, *supra* note 149, § 18(3), 1965 BGBl, Teil I at 1297).

[159] *Gesetz gegen Wettbewerbsbeschränkungen* (Law against Restraint of Competition) § 102(a), in 1974 BGBl, Teil I at 895; *see* A. Dietz, *supra* note 130, at 221.

[160] *See, e.g.*, A. Dietz, *supra* note 130, at 221.

[161] Treaty establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, 1957 BGBl, Teil II at 753, 298 U.N.T.S. 11. Article 86 prohibits an enterprise from exploiting in an improper manner a dominant position within a substantial part of the Common Market. *Id.* art. 86, 1957 BGBl, Teil II at 826, 298 U.N.T.S. at 48-49. The Commission found (1) that GEMA was an enterprise within the meaning of article 86; (2) that it dominated music performance rights licensing in West Germany, a substantial part of the Common Market; and (3) that it exploited this dominant position in an improper manner as discussed below. *See* G. McFarlane, *supra* note 143, at 179.

[162] *Id.* at 179. More specifically, the Commission objected to GEMA's requirement that members assign it copyrights for all categories of works and for the whole world—requirements which were not "objectively justified" and which complicated the movement of its members from GEMA to other societies.

[163] *Id.* (citing Commission Decision of June 2, 1971 (*In re* GEMA), 14 J.O. Comm. Eur. (No. L 134) 15 (1971), 1971 Common Mkt. L.R. (CCH) D35).

[164] *Id.* at 180-81.

Several authorities have severely criticized the GEMA decision, and the application of antimonopoly laws to the operations of performing rights societies in general. During the Commission's investigation of GEMA, the European Broadcasting Union complained to the Commission that "if competition were to be artificially created in this sphere it would be to the detriment of broadcasting organizations which . . . would suffer consequences economically harmful to them." It suggested instead that the Commission "recommend to the governments concerned to insert provisions in their domestic legislations for the setting up of a jurisdictional, arbitration, or ratifying body with powers . . . to determine the royalty payable by the broadcasting organizations to the society."[166]

One commentator argued that if the result of the GEMA decision were carried to its logical conclusion, there might be a multiplicity of collecting societies, each controlling within Germany or any other Community State the rights of different groups of authors.[167] This would present a considerable impediment to the music user, who "would have to look up lists to see which society controlled the rights in the particular work he wished to use and whether he had the society's license to do so."[168]

C. *The Advantages of Agency Regulation*

The primary advantage of agency regulation, as established both in the United Kingdom and West Germany, is that such authorities better balance the relative bargaining power of the parties to licensing transactions. Agencies provide an efficient and expedient method of resolving disputes concerning the fee or terms of licenses that is accessible even to the smallest user. The power of the agency to arbitrate disagreements severely constrains the ability of the performing rights society to exploit the bargaining advantage it would otherwise enjoy. While similar recourse is theoretically available to users in this country under the provision in the 1950 consent decree authorizing the Southern District of New York to determine blanket licensing fees, and while there is some evidence that the court's power to set fees encourages both users and ASCAP to act reasonably in negotiating blanket licenses, the regulatory systems developed in other countries still possess distinct advantages.

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[165] *Id.* at 183.

[166] Wallace, *supra* note 132, at 382 (quoting Letter from the European Broadcasting Union to the Commission of the European Economic Community (June 4, 1969)).

[167] *Id.* at 382.

[168] *Id.*

An administrative agency whose sole function is to set rates for music performing rights or to settle disputes between collecting societies and licensees is undoubtedly more expert than the judiciary to determine reasonable blanket licensing fees.[169] In contrast to the expensive and frustrating litigation that would accompany a judicial fee determination, agency appeal procedures like those found in other nations presumably would foster expediency and reduce otherwise prohibitive costs.[170] In contrast to the uncertainty engendered by the possibility of conflicting judicial determinations, a single agency would provide for greater consistency.

In addition, the authority of the Southern District under the decree extends only to determinations of reasonable blanket licensing fees. The court has been held not to possess the authority to order ASCAP to issue other types of licenses or to settle disputes over other terms. Moreover, private parties, considered nonparties to the agreement, are unable to charge that ASCAP's licensing practices violate the terms of the decree.[171] In contrast, an administrative agency would be able to settle disputes as to licensing terms other than fees and to authorize alternative forms of licensing on an experimental basis to determine if there are certain contexts where blanket licensing would be less desirable. Finally, the effectiveness of the consent decree as a means of equalizing bargaining power is undermined by the continuing threat of new, lengthy, and expensive private antitrust challenges to blanket licensing. For all of these reasons, an administrative agency is better suited than the judiciary to ensure that users obtain blanket licenses at reasonable rates.

For the United States to establish a system of administrative regulation to guard against potential monopolistic abuses by ASCAP and BMI, Congress would first have to exempt performing rights organizations from antitrust liability. ASCAP and BMI could then issue blanket performance licenses to all users of copyrighted music without being restricted to those markets that withstand a rule of reason analysis. Congress would then need to establish an administrative agency to resolve licensing disputes between the organizations and their music licensees. Congress could even vest such authority in the Copyright Royalty Tribunal, which currently sets blanket performance licensing fees for certain groups of users.[172] Because the Tribunal is already familiar with setting licensing fees for performance rights and with gathering information relevant to the determination of such fees, it seems well suited to the proposed task. Specific provision should be made to promote the speedy resolution of licensing disputes and to avoid the other limitations associated with the judicial rate-setting authority provided for in the consent decree. The remedy should be designed to discourage frivolous or dilatory claims, as well as intimidation tactics by the performing rights societies.

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[169] "[While] judicial fee-setting definitely influences fee negotiations, [its] use as a dispute resolving mechanism . . . is questionable. The District Court for the Southern District of New York hardly possesses expertise in copyrights-licensing fees. Resort to the district court would in most cases be the equivalent of litigation." Note, *Blanket Licensing*, *supra* note 18, at 749.

[170] *See supra* text accompanying note 142.

[171] *See supra* notes 59-60.

[172] *See* Note, *Blanket Licensing*, *supra* note 18, at 749. The Copyright Royalty Tribunal was

Finally, Congress might consider giving the new agency a general supervisory authority in addition to providing for the arbitration of licensing disputes. The agency might be given the power to issue and enforce licensing regulations similar to those contained in the consent decrees.[173] The agency might also be able to experiment with different forms of music licensing to meet exceptional needs. A system of administrative regulation would introduce flexibility and fairness into the licensing of performance rights without the delay, expense, and frustration accompanying antitrust enforcement.

CONCLUSION

While the blanket licensing of musical performing rights is crucial to their exploitation, history has demonstrated a definite need for some mechanism to prevent ASCAP and BMI from abusing their market power to exact unreasonable fees from licensees. The enforcement of antitrust legislation is at best an awkward device for balancing the bargaining power of performing rights societies and their licensees. Both private litigation and consent decree enforcement are unavailable to many users as mechanisms for guarding against abuses of monopoly power. More important, it makes little sense to use price competition as a regulatory mechanism since price differentials rarely influence a user's selection of music. Such regulation does nothing to ensure that users can obtain performance licenses at reasonable rates since the market power of ASCAP and BMI is merely transferred to another organization like the Fox Agency. In contrast, the existence of a government agency to regulate the activities of performing rights societies would operate as a direct check against abuses of bargaining power by such organizations.

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established under the Copyright Act of 1976 to set royalty rates for compulsory licensing fees to be paid to copyright owners for mechanical rights, and for blanket performance rights for jukeboxes and secondary cable transmissions. 17 U.S.C. §§ 801-810 (1982). Because its rate-setting functions differ from the arbitrative functions of the new agency this Comment proposes, the Tribunal should be vested with the latter authority only if separate provision is made for increased administrative capacity and expertise.

[173] *See supra* notes 56-57 and accompanying text.

The effectiveness of agency regulation in preventing performing rights societies from issuing blanket licenses upon unfair terms is demonstrated by the experiences of other Western nations that have established such agency oversight. Given the caution usually associated with increased administrative regulation in any context, these systems would appear especially attractive as they retain the market as the primary mechanism for setting blanket licensing fees, with the government stepping in only to correct market imperfections caused by the performing rights organizations' monopoly powers. Given the clear need to regulate performing rights societies, and the fact that antitrust laws are ill suited to this task, Congress should not hesitate to draw upon the resources of the Copyright Royalty Tribunal or to create a new regulatory agency.[174] Agency regulation preserves the advantages of blanket licensing, and appears better suited to securing performance rights for users at reasonable rates.

*Jay M. Fujitani**

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[174] There are precedents for direct governmental involvement in setting prices for various rights in music in this country. For example, the Copyright Royalty Tribunal is vested with the authority to set royalty rates for compulsory license fees to be paid to copyright owners for mechanical rights in their music, and for blanket performing rights for jukeboxes and secondary cable transmissions. *See supra* note 172. More recently, the Register of Copyrights has proposed the creation of a performing right in sound recordings also subject to compulsory blanket licensing. *See* A. LATMAN & R. GORMAN, *supra* note 8, at 413-16. The acceptability of regulation of performing rights organizations by a governmental agency, as this Comment proposes, would appear to be foreshadowed by prior governmental involvement in setting prices for music rights.

* B.A. 1981, University of California, Los Angeles; third-year student, School of Law (Boalt Hall), University of California, Berkeley.

Senator ZORINSKY. Again, Mr. Chairman, this isn't an attempt to do away with payment of copyright royalties, and it isn't an attempt to not pay a fair share in recognition for the efforts of the artists involved, but I do think it is a fair attempt to equalize and bring equity to a situation, I think, that cries for resolution of this problem.

Mr. Chairman, again I want to thank you for taking the time to hold this hearing.

Senator MATHIAS. Thank you, Senator Zorinsky. I have just one or two questions.

One is, how do you arrive at the figure of $50 as a one-time fee per box?

Senator ZORINSKY. The same way an annual fee was arrived at of $50 by the Tribunal. The feeling that it would be equity on the part of the individual involved, inasmuch as they do pay a 4.5-cent-a-side per record, because obviously the phonograph wouldn't play unless you put a record on it. So, since they pay about 8 cents a record in royalty fees when they purchase the record, and the average of about 50 or 60 records go on each jukebox, and you multiply that by 8 cents and in addition to that the $50 one-time fee would be through the life of the machine.

I don't know how you attribute a number designated other than I think $50 a year is too high, also.

Certainly there is room for negotiation, I would assume.

Senator MATHIAS. How long do these machines last, usually?

Senator ZORINSKY. It depends. Right now the Royalty Tribunal requests a decal. We used to have a high incidence of arson in taverns and restaurants. The machine would burn up, the decal would disappear, we didn't have it to transfer to another machine, or we couldn't get a refund once an establishment closed down.

Today, there are numerous bankruptcies, businesses going broke, and you pay the $50 fee on the front end, a place goes broke in January, February, or June, and you are just out of luck. You have paid that money out.

So, you know, I just feel paying it at the manufacturer, like we do the Federal excise tax on cigarettes—they don't go to every tavern and restaurant to collect the excise tax for cigarettes. They go to Brown & Williamson, R.J. Reynolds, Liggett & Myers, and at the point of production collect that tax.

Senator MATHIAS. Would you say, barring the bad luck of a fire——

Senator ZORINSKY. A bankruptcy.

Senator MATHIAS. Or of a tavern brawl, that a machine might last five or six years?

Senator ZORINSKY. Yes, sir.

Senator MATHIAS. So that really puts us back at the level of the old $8 annual fee.

Senator ZORINSKY. Carry that a point further. If it should be $50 a year for 5 years, that is $250. That is about 8 percent of the purchase price of the phonograph. Are you saying that is an equitable figure?

Senator MATHIAS. I am just trying to establish the facts.

You talked about the old days. I used to play a lot of jukeboxes in the old days. As I recall, the price was a nickel a song. What is the current rate?

Senator ZORINSKY. I think it is probably two for a quarter right now.

Senator MATHIAS. Senator Metzenbaum.

Senator METZENBAUM. How much does a machine cost today?

Senator ZORINSKY. I have been out of the business, but I assume they are in the range of $3,000 or $4,000, new ones.

Senator METZENBAUM. So if interest rates were 7 percent, the value of that money would be $210 to $280 a year. If it is at 12 percent, it is $360 to $400 a year.

Senator ZORINSKY. That's correct.

Senator METZENBAUM. The thrust of your testimony is that this fee has substantially contributed to the decline in the usage of jukeboxes. My real question is, first: Aren't there other factors which account for the increase such as the cost of money for the machines—the machines have gone up so much. Second, taverns today use—I don't know what they call them, but I guess they are video discs—and they have some kind of equipment that brings in taped dancing and entertainment. Consequently, this whole fee question is a de minimus factor as pertains to the economic viability of the industry. I notice one person testified, he sells them, a Mr. Gordon, and he has a chart showing how jukebox sales have gone down.

Well, I wouldn't doubt that, because if you can see Michael Jackson dancing on the screen while you are having your beer, it is a little bit better than hearing Frank Sinatra croon.

Senator ZORINSKY. To some of us. [Laughter.]

Senator MATHIAS. You are showing your age.

Senator METZENBAUM. Well, you older fellows probably feel that way about it. [Laughter.]

But I think the issue here has come down to what I consider to be a rather modest amount of dollars as compared to the total dollars involved in the cost of the equipment and some of the other competitive factors in the industry, and I am wondering whether or not we have this bill concentrating on the lesser of the problems and that if you are really going to help the jukebox industry maybe you have to bring down the cost of the jukebox in the first instance and, secondly, you have to ban other kinds of entertainment in the bars and various and sundry other matters.

I think the current issue revolves around this fee matter, but I am not at all certain that that is the crux of the issue.

Senator ZORINSKY. Well, quite obviously you are correct in saying that this isn't the only reason for the reduction in the number of jukeboxes that are out today. Obviously, it is a total economic picture, and certainly that is the time to try to alleviate some of these unfair burdens, not to say, "Well, let's keep them up," and hasten the day when there will be no more jukeboxes.

What has actually done away with a lot of jukeboxes is urban renewal. The honkytonk bar isn't as plentiful as it should be. People have gone to more sophisticated types of music, as you point out, turntable personal request type music.

Senator **Metzenbaum**. I am impressed that you know all about the entertainments available in the bars, Senator. [Laughter.]

Senator **Zorinsky**. I wouldn't question your integrity when it came to parking a car.

Senator **Metzenbaum**. I didn't question your integrity at all——

Senator **Zorinsky**. You used to have all the APCO parking lots.

Senator **Metzenbaum**. I got out of the business too soon, Ed.

Senator **Zorinsky**. I didn't get out mine soon enough. [Laughter.]

Just recently the City of Omaha was raising its fee on jukeboxes. This isn't the only tax on jukeboxes. It is a culmination of many of them. They agreed to hold up and evaluate the size. I am not saying it shouldn't be raised. I am saying when you go from $8 to $50, which is a tremendous increase, there has to be some line and logic, also.

You say, "Where did you get the $50 one-time fee?" The question is also, "Why did you get the $50 annually, plus the cost-of-living increase every year?" and you and I know what that cost-of-living increase on top of the $50 will be. In no time we will have that thing in the same shape as we have got Social Security and all the neat programs that we hook cost of living on in our own Congress.

So I can just see the day coming down the line, "Why isn't $20 a year sufficient? Why does it have to be $50 a year?" But the facts remain, and they are quite tangible, that this is one of the reasons that is exacerbating the extinction of something that was as American as apple pie and hotdogs, and that is the jukebox, which is rapidly disappearing.

For government to lend its weight to make it disappear sooner and quicker from people who pay taxes that fund our salaries back here I don't think is the American way of doing things.

Senator **Mathias**. Thank you very much.

Senator **Zorinsky**. Thank you.

Senator **Mathias**. Senator D'Amato, I welcome you to this committee.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator **D'Amato**. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate very much the opportunity to appear before you and the committee today, to express my reasons for opposing S. 1734, the Coin-Operated Phonorecord Player Copyright Act of 1983, the so-called jukebox bill.

This bill is unfair, it is inconsistent with expressed congressional intent and, although not intended as such by its proponents, it may well become an open invitation to noncompliance with the registration requirements of the Copyright Act.

S. 1734 is special-interest legislation for jukebox operators. It seeks to replace the present system based on continuing payments for continuing use with one based on a one-time buyout of $50 for each new machine and $25 or less for machines now in use.

This one-time payment would be grossly unfair to composers of today's music. It would be unconscionable when applied to future composers whose music will be played long after the one-time fee is distributed.

I urge the members of the committee not to think of the present situation as one that exploits the poor jukebox operator on behalf of the fat-cat composer. Most songwriters do not earn their livings from royalty payments.

For example, out of 25,000 members of ASCAP, the American Society of Composers, Authors and Publishers, only 1,000 earn over $10,000 per year from performances of their music.

As you consider S. 1734, I urge you to keep uppermost in your minds that the product being sold by the jukebox operators is a musical performance. It is only fair, therefore, that the creators of the product being performed on a continuing basis be paid on a continuing basis.

Current law recognizes and supports this fundamental principle of fairness. S. 1734 would violate it completely.

Under its terms, if the $50 buyout fee for a new machine is distributed in 1985, the composer of a song recorded and placed in such a machine in 1986, even if it were the song most frequently played on that machine, would receive absolutely no compensation whatsoever. Multiply that inequity by hundreds of thousands of jukeboxes around this country and you have injustice of truly massive dimensions.

Nor is the plight of the jukebox operators as desperate as some of them would have you believe. According to an April 1984 article in Replay Magazine, jukeboxes average $45.50 gross per week, or $2,366 per year. The $50 annual fee is less than 2.2 percent of the annual gross. It is less than 14 cents per day, about the average cost of a single play on a jukebox. Of course, in the New York metropolitan area, the average cost is generally 25 cents per play. I make that observation. I don't know what it is in other areas of the country, but in New York it is 25 cents for each play.

Senator MATHIAS. That is twice the figure that Senator Zorinsky mentioned. It is five times what I remember. [Laughter.]

Senator D'AMATO. I have to confess to you, Mr. Chairman, I don't remember the days of the nickel play. [Laughter.]

Senator METZENBAUM. You just lost Senator Mathias' vote.

Senator MATHIAS. In some respects you are lucky, and in some respects you are not. [Laughter.]

Senator D'AMATO. Mr. Chairman, I am going to ask that the balance of my remarks be placed in the record.

Senator METZENBAUM. Before you get in more trouble.

Senator D'AMATO. But the fact of the matter is that the Copyright Tribunal Board did give very careful consideration to this issue. It asked those who came before it, the jukebox operators, to submit evidence with respect to the cost. The jukebox operators indicated that, yes, they looked for a fair return, they charged for a fair return, but the fact of the matter is that this $50 annual fee, as Senator Metzenbaum has very well pointed out, is not the cause for there being fewer jukeboxes in operation. What we would be doing if we were to pass this bill would be to create a situation that would be totally unfair to the music composers.

The Copyright Act's provisions relating to jukeboxes have been well crafted. It now gives due regard to the artist, to the composer, and I would suggest that if we simply say we are going to have a one-time buyout, we will do violence to this entire system, which is one that has been equitably maintained.

Mr. Chairman, for this and other reasons, I would hope that the carefully crafted compromise embodied in the Copyright Act of 1976 would stand without alteration.

Of course, if you have any questions, I would be glad to attempt to answer them.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF SENATOR ALFONSE D'AMATO

MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO EXPRESS MY REASONS FOR OPPOSING S. 1734, THE COIN-OPERATED PHONORECORD PLAYER COPYRIGHT ACT OF 1983, THE SO-CALLED JUKEBOX BILL.

THIS BILL IS UNFAIR; IT IS INCONSISTENT WITH EXPRESSED CONGRESSIONAL INTENT; AND, ALTHOUGH NOT INTENDED AS SUCH BY ITS PROPONENTS, IT MAY WELL BECOME AN OPEN INVITATION TO NONCOMPLIANCE WITH THE REGISTRATION REQUIREMENTS OF THE COPYRIGHT ACT.

S. 1734 IS SPECIAL INTEREST LEGISLATION FOR JUKEBOX OPERATORS. IT SEEKS TO REPLACE THE PRESENT SYSTEM, BASED ON CONTINUING PAYMENTS FOR CONTINUING USE, WITH ONE BASED ON A ONE-TIME BUY OUT OF $50 FOR EACH NEW MACHINE AND $25 OR LESS FOR MACHINES NOW IN USE.

THIS ONE-TIME PAYMENT WOULD BE GROSSLY UNFAIR TO COMPOSERS OF TODAY'S MUSIC. IT WOULD BE UNCONSCIONABLE WHEN APPLIED TO FUTURE COMPOSERS WHOSE MUSIC WILL BE PLAYED LONG AFTER THE ONE-TIME FEE IS DISTRIBUTED.

I URGE THE MEMBERS OF THE COMMITTEE NOT TO THINK OF THE PRESENT SITUATION AS ONE THAT EXPLOITS THE POOR JUKEBOX

OPERATOR ON BEHALF OF THE FAT CAT COMPOSER. MOST SONGWRITERS DO NOT EARN THEIR LIVINGS FROM ROYALTY PAYMENTS. FOR EXAMPLE, OUT OF 25,000 MEMBERS OF ASCAP (THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS), ONLY 1,000 EARN OVER $10,000 PER YEAR FROM PERFORMANCES OF THEIR MUSIC.

AS YOU CONSIDER S. 1734, I URGE YOU TO KEEP UPPERMOST IN YOUR MINDS THAT THE PRODUCT BEING SOLD BY JUKEBOX OPERATORS IS A MUSICAL PERFORMANCE. IT IS ONLY FAIR, THEREFORE, THAT THE CREATORS OF THE PRODUCT BEING PERFORMED ON A CONTINUING BASIS, BE PAID ON A CONTINUING BASIS.

CURRENT LAW RECOGNIZES AND SUPPORTS THIS FUNDAMENTAL PRINCIPLE OF FAIRNESS. S. 1734 WOULD VIOLATE IT COMPLETELY.

UNDER ITS TERMS, IF THE $50 BUY OUT FEE FOR A NEW MACHINE IS DISTRIBUTED IN 1985, THE COMPOSER OF A SONG RECORDED AND PLACED IN SUCH A MACHINE IN 1986, EVEN IF IT WERE THE SONG MOST FREQUENTLY PLAYED ON THAT MACHINE, WOULD RECEIVE ABSOLUTELY NO COMPENSATION WHATSOEVER. MULTIPLY THAT INEQUITY BY HUNDREDS OF THOUSANDS OF JUKEBOXES AROUND THIS COUNTRY AND YOU HAVE INJUSTICE OF TRULY MASSIVE DIMENSIONS.

NOR IS THE PLIGHT OF THE JUKEBOX OPERATORS AS DESPERATE

AS SOME OF THEM WOULD HAVE YOU BELIEVE. ACCORDING TO AN APRIL, 1984, ARTICLE IN REPLAY MAGAZINE, JUKEBOXES AVERAGE $45.50 GROSS PER WEEK (OR $2366.00 PER YEAR). THE $50.00 ANNUAL FEE IS LESS THAN 2.2% OF THE ANNUAL GROSS. IT IS LESS THAN 14¢ PER DAY, ABOUT THE AVERAGE COST FOR A SINGLE PLAY ON A JUKEBOX.

THE OPERATORS ARGUE THAT AN INCREASE OF 525% IN THE ROYALTY FEE (FROM $8 TO $50) IS EXCESSIVE. THIS ARGUMENT ALSO DOES NOT HOLD UP. UNTIL 1978, WHEN THE COPYRIGHT ACT OF 1976 TOOK EFFECT, JUKEBOX OPERATORS PAID NOTHING AT ALL FOR THEIR USE OF COPYRIGHTED MATERIALS. THIS FREE RIDE RESULTED FROM AN ANOMALY IN THE 1909 COPYRIGHT LAW, WHICH WAS CORRECTED IN THE 1976 ACT.

AT THAT TIME, JUKEBOX OPERATORS REJECTED THE NOTION OF NEGOTIATING ROYALTY PAYMENTS IN THE OPEN MARKET AND SOUGHT A SPECIAL LICENSING ARRANGEMENT. CONGRESS GRANTED THEIR REQUEST AND SET THE INITIAL FEE AT AN ARTIFICIALLY LOW $8.00. AS BOTH THE SENATE AND HOUSE REPORTS DOCUMENT, THIS $8.00 FEE WAS NOT BASED ON ANY OBJECTIVE ECONOMIC FACT. BECAUSE THE FEE WAS SET AT A LOW LEVEL TO EASE THE TRANSITION TO A ROYALTY SYSTEM, CONGRESS ESTABLISHED A

SYSTEM OF PERIODIC REVIEW AND ADJUSTMENT TO ASSURE THAT FUTURE ANNUAL FEES WOULD REFLECT ECONOMIC REALITY. S. 1734 WOULD DESTROY THIS ESSENTIAL SYSTEM OF PERIODIC REVIEW AND ADJUSTMENT.

THE COPYRIGHT ACT OF 1976 CREATED A ROYALTY TRIBUNAL AND DIRECTED IT TO ESTABLISH A FAIR FEE STRUCTURE. THE FIRST REVIEW WAS TO OCCUR IN 1980, WITH PERIODIC REVIEWS EVERY TEN YEARS THEREAFTER.

IN 1980, THE COPYRIGHT ROYALTY TRIBUNAL HELD HEARINGS, WHICH INCLUDED DETAILED TESTIMONY AND SURVEY DATA PRESENTED BY THE ORGANIZATION REPRESENTING JUKEBOX OPERATORS, THE AMUSEMENT AND MUSIC OPERATORS ASSOCIATION (AMOA). THE TRIBUNAL FOUND THAT "AMOA FAILED TO PROVIDE RELIABLE DATA CONCERNING OPERATING EXPENSES, REVENUES, OR RETURN ON INVESTMENT FOR JUKEBOX OPERATORS ... AND THAT THE SURVEY INFORMATION IS NOT CONSISTENT WITH OTHER EVIDENCE IN THE RECORD." HOWEVER, UNDER QUESTIONING, THE JUKEBOX OPERATORS DID ADMIT THAT THEY PAID FAIR MARKET VALUE FOR OTHER PRODUCTS AND SERVICES ESSENTIAL TO THEIR BUSINESSES, INCLUDING MACHINES, CARS, LABOR, AND INSURANCE.

COPYRIGHT OWNERS PRESENTED DATA SHOWING LICENSE FEES

FOR COMPARABLE USE NEGOTIATED IN THE OPEN MARKET AVERAGED $70.00 TO $130.00 ANNUALLY. ANNUAL LICENSE FEES FOR JUKEBOXES IN WESTERN EUROPE AVERAGE $96.00 AND THE MEDIAN COST IS $71.00.

THE TRIBUNAL FOUND THAT A $50.00 ANNUAL FEE, PHASED IN OVER FOUR YEARS, WAS APPROPRIATE WITH THE FOLLOWING RATIONALE: "WE CANNOT ON THE BASIS OF THE EVIDENCE PRESENTED BY THE JUKEBOX INDUSTRY FIND THAT OUR SCHEDULE WILL HAVE A DISRUPTIVE IMPACT ON THE STRUCTURE OF THE JUKEBOX INDUSTRY OR DISTURB GENERALLY PREVAILING INDUSTRY PRACTICES ... THE JUKEBOX INDUSTRY PAYS REASONABLE MARKET PRICES FOR ALL OTHER GOODS AND SERVICES THEY REQUIRE. WE HOLD THAT THEY CAN PAY THE SCHEDULE WE HAVE ADOPTED FOR THE CENTRAL COMMODITY OF THEIR BOXES WITHOUT ADVERSE IMPACT."

JUKEBOX OPERATORS APPEALED THE TRIBUNAL'S DECISION TO THE 7TH CIRCUIT COURT OF APPEALS, WHICH REJECTED THEIR CLAIMS AND UPHELD THE TRIBUNAL'S DECISION. THE SUPREME COURT HAS REFUSED TO HEAR THE CASE. SO NOW, JUKEBOX OPERATORS, WHOSE ARGUMENTS HAVE BEEN REJECTED BY THE TRIBUNAL AND THE COURTS, TURN TO CONGRESS FOR RELIEF. SINCE THE JUKEBOX OPERATORS DON'T LIKE THE RESULTS OF THE

COPYRIGHT LICENSE SYSTEM DEVELOPED AT THEIR REQUEST, THEY ARE ATTEMPTING TO CHANGE THE RULES AFTER THE GAME HAS BEEN PLAYED.

TO SUPPORT THEIR CASE, THEY PRESENT THE DUBIOUS ARGUMENT THAT "OPERATORS WHO HAVE NOT REGISTERED THEIR MACHINES WITH THE COPYRIGHT OFFICE, OFTEN DUE TO IGNORANCE OF THE LAW, ARE LEAVING THE BUSINESS ONCE THEY BECOME AWARE OF THE LAW'S REQUIREMENTS VIA A DEMAND FROM A PERFORMING ARTS SOCIETY TO PAY THOUSANDS OF DOLLARS IN DAMAGES FOR WHAT WAS NO MORE THAN A $25.00 VIOLATION."

BUT, AS I UNDERSTAND IT, THE PERFORMING ARTS SOCIETIES HAVE NOT SOUGHT THOUSANDS OF DOLLARS IN DAMAGES FOR $25.00 VIOLATIONS. THEIR LAWSUITS HAVE BEEN FILED AGAINST OPERATORS WHO OWN MANY, SOMETIMES HUNDREDS, OF MACHINES AND WHOSE INFRINGEMENTS ARE ALLEGED TO HAVE OCCURRED FOR MORE THAN ONE YEAR.

AMOA'S OWN ESTIMATES OF THE NUMBER OF JUKEBOXES IN THE UNITED STATES RANGE FROM 250,000 TO 450,000. IN 1983, THE COPYRIGHT OFFICE HAD ONLY 114,332 MACHINES REGISTERED.

AT LEAST UNDER CURRENT LAW, COPYRIGHT HOLDERS CAN LOOK AT A JUKEBOX AND SEE WHETHER IT HAS BEEN REGISTERED.

S. 1734 WOULD REMOVE EVEN THIS POSSIBILITY FOR ENFORCEMENT BY ELIMINATING THE REQUIREMENT FOR REGISTRATION CERTIFICATES TO BE AFFIXED TO JUKEBOXES. MOREOVER, S. 1734 GRANTS AMNESTY TO THOSE OPERATORS WHO NEVER COMPLIED WITH EXISTING LAW.

THE JUKEBOX LICENSING ISSUE HAS BEEN FAIRLY CONSIDERED BY CONGRESS, BY THE COPYRIGHT ROYALTY TRIBUNAL, AND BY THE COURTS. THE PRESENT LAW IS A COMPROMISE WORKED OUT OVER MANY YEARS WITH DUE DELIBERATION. MR. CHAIRMAN, I STRONGLY RECOMMEND YOU LET THE CAREFULLY CRAFTED COMPROMISE EMBODIED IN THE COPYRIGHT ACT OF 1976 STAND WITHOUT ALTERATION.

THANK YOU, MR. CHAIRMAN.

Senator MATHIAS. Thank you, Senator D'Amato. I don't think I have any questions.

Senator D'AMATO. Thank you.

Senator MATHIAS. Next, we are happy to welcome the distinguished Senator from Tennessee, Senator Sasser.

STATEMENT OF HON. JIM SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator SASSER. Thank you, Mr. Chairman. I am honored to appear here this morning before this subcommittee chaired by yourself, and including my able friend from Ohio, Senator Metzenbaum.

Mr. Chairman, I have some deep reservations concerning S. 1734, the so-called jukebox bill. As I am sure this committee knows, Nashville, TN, my hometown, is the center of the country music industry. Now, this industry contributes thousands of jobs and literally tens of millions of dollars to the Tennessee economy.

For example, bookings of musicians by Nashville, TN, agencies alone netted more than $200 million just this past year. Country music accounts for nearly 15 percent of total annual record sales in the United States of roughly $570 million.

So, Mr. Chairman, country music in Tennessee is big business, and it is big business in a State where the unemployment average has been running consistently ahead of the national average now for a number of years.

The legislation before this subcommittee today addresses concerns which directly affect the music industry. As the committee knows, first of all it reverses the present system of continuing royalties for continuing performances. The present system recognizes that if an artist's work merits the long-term popularity of a hit, the artist should be rewarded on a continuing basis. The legislation before us would provide only for a one-time fee, covering future performances of music.

Now, I sincerely believe this would be unfair to the artist, the composer, and I favor keeping the system on the books.

Second, the one-time fee would actually amount to less than the $8 annual fee that the Amusement and Music Operators' Association agreed to in 1976. If we assume the average life of a jukebox is 7 years, the proposed one-time fee works out to a little more than $7 per year.

Lastly, Mr. Chairman, this legislation freezes the royalty fee permanently into law. It substitutes an arbitrary figure for the considered and reasoned judgment of the Copyright Royalty Tribunal. When the copyright law was passed in 1976, the Senate report explicitly stated that it felt the $8 annual fee was manifestly too low, and in any case totally arbitrary and, of course, if we found $8 too low in 1976, it would be considerably lower today due to the ravages of inflation.

Mr. Chairman, the Tribunal has decided that an annual fee of $50 per box was reasonable, and directed that it be phased in over 4 years to minimize disruption. That decision has been upheld by the courts, and I think that at this time it would be unwise for the Congress to substitute an inflexible and arbitrary figure for the considered judgment of an independent, expert entity.

Mr. Chairman, I strongly believe that music composers and artists and others reflect not only society's culture, but they are many times at the leading edge of that culture, and if we are going to encourage cultural development, I sincerely believe that it is important that we reward our artists. There are many rewards that come to them, but they certainly should include financial rewards.

Clearly, the way to do this is to see that the artists receive the royalties that are due them. I have every confidence in this chairman and in this committee, and I know that these committee members will carefully consider the adverse effects of this legislation on the music industry.

Mr. Chairman, I thank you for allowing me to appear here today and present my views, and I ask that my statement be incorporated into the record.

Senator MATHIAS. Without objection, your full statement will be included in the record. Thank you very much.

[The prepared statement of Senator Sasser follows:]

PREPARED STATEMENT OF SENATOR JIM SASSER

Thank you Mr. Chairman, first of all, I would like to thank you for allowing me the opportunity to come before this subcommittee today to testify on a matter which directly impacts upon the music industry in Tennessee.

I have some deep reservations concerning S. 1734, the so-called jukebox bill, which is the issue before this subcommittee today. Nashville, Tennessee is the center of the country music industry. This industry contributes more than 5,000 jobs and over $10 million to the Tennessee economy. It is estimated that bookings by Nashville agencies alone net more than $200 million per year.

Country music accounts for nearly 15 percent of total annual record sales in the United States or roughly $570 million. As you can clearly see, country music in Tennessee is big business.

Now the legislation that is before this subcommittee today addresses concerns which directly affect the music industry. First of all, it reverses the present system of continuing royalties for continuing performances. The present system recognizes that if an artist's work merits the long-term popularity of a hit, then the artist should be rewarded—on a continuing basis. The legislation before us would provide for a one-time fee covering future performances of the music. This, I believe would be unfair to the artist and I favor the present system.

Second, this one-time fee would actually amount to less than the $8 annual fee the amusement and music operators association agreed to in 1976. If you assume that the average life for a jukebox is 7 years, the proposed one-time $50 fee works out to little more than $7 per year.

Third, this legislation freezes the royalty fee permanently into law. It substitutes an arbitrary figure for the considered judgment of the Copyright Royalty Tribunal. When the copyright law was passed in 1976, the Senate report explicitly stated that it felt the $8 annual fee was manifestly too low and in any case totally aribitrary.

Congress directed the Copyright Royalty Tribunal to set a fair and equitable fee through its review process and to periodically adjust those fees. The tribunal held extensive hearings during which both representatives of the jukebox industry and the organizations representing copyright owners presented detailed evidence for and against higher fees.

The tribunal decided an annual fee of $50 per box was reasonable and directed that it be phased in over 4 years to minimize disruption. That decision has been upheld by the courts. I believe it would be unwise for Congress to substitute an inflexible and arbitrary figure for the considered judgment of an independent and expert agency.

Mr. Chairman, artists not only reflect a society's culture, they are many times the leading edge. If we are going to encourage cultural development, I believe it is important that we reward our artists. Among other rewards, this includes financial rewards.

Clearly, the way to do this is to see that the artists receive the royalties that are due them. We must maintain a royalty payments system which is flexible yet certain.

I urge the committee members to thoroughly consider the adverse effects this or similar legislation would have upon the music industry. Once again, thank you for providing me the opportunity to appear here today.

Senator MATHIAS. Our next witness will be the Register of Copyrights, Mr. David Ladd, who is a frequent visitor here, and who is always welcome.

STATEMENT OF HON. DAVID LADD, REGISTER OF COPYRIGHTS, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, U.S. COPYRIGHT OFFICE, AND DAVID E. LEIBOWITZ, POLICY PLANNING ADVISER TO THE REGISTER OF COPYRIGHTS

Mr. LADD. Thank you, sir.

I am accompanied, Mr. Chairman, by Dorothy Schrader, the General Counsel of the U.S. Copyright Office, and David Leibowitz, a Policy Planning Advisor in my office.

Since the prepared statement will be put into the record, I will go directly to particular points in summarizing the testimony.

As you know, Mr. Chairman, the role of the Copyright Office in the administration of the compulsory licensing of jukeboxes is quite limited. The Office issues the license certificates and collects the royalty fees. We do not in any way participate in adjusting the royalty rates; that function is allocated to the Copyright Royalty Tribunal, which also, in cases of controversy, decides how the collected amounts will be distributed.

Several references already have been made to the CRT decision adjusting the jukebox royalty rate. This decision was confirmed in all respects by the Court of Appeals for the Seventh Circuit.

In setting the $50 annual rate, which was imposed on a staggered basis as $25 in 1982 and 1983, the Copyright Royalty Tribunal applied what they called market analogies.

As you have heard before from previous witnesses, the salient feature of S. 1734 would be to substitute for that annual $50 rate, adjusted from time to time by the CRT in accordance with the statute with a one-time $50 payment.

The Copyright Office, appearing on other copyright legislation before the Congress previously has expressed its preference for contractual or voluntary arrangements in the administration and exploitation of copyrights, grounded on the fundamental principle of freedom of contract, and taking into account that in foreign countries the collective administration of rights and private contracts are almost the exclusive way of licensing copyrighted works.

Parenthetically, it was a declared purpose of the 1976 revision of the Copyright Act to bring American law into a condition from which the United States could more readily adhere to the Berne Convention, to which we presently do not belong. The Berne Convention would prohibit any compulsory licensing for the performance of nondramatic musical works.

The Copyright Office has also expressed in testimony before the Congress the preference, where a compulsory licensing mechanism is used for any reason, such as to overcome unacceptable transactions costs, to set the royalties at a rate which approximates that which the market would set. That is what the CRT attempted to do here.

Once one departs from the principle of voluntary arrangements for the licensing of copyrighted works, the Copyright Office expresses no view on what that royalty rate should be.

In setting the royalty rate, there are two possibilities. One is to try to approximate a market rate, as was done in the CRT case, The other is to arbitrarily, set the rate, for political compromise or whatever other reason. To do the latter requires no expertise, but it does at least require a proceeding like this to examine the issue.

The Copyright Office has no vested interest in administering this license. That follows naturally from my declaration that we would prefer to see a totally voluntary licensing arrangement which would eliminate the jukebox compulsory license completely.

Let me now comment on other provisions of the bill. First the bill would alter the definition of "coin-operated phonorecord player," and thus remove the present statutory limitation disqualifying machines located in establishments where there is a direct or indirect charge for admission. This charge would broaden the scope of the jukebox compulsory license and we do oppose that.

Second, the bill would eliminate the requirement that the license certificate—which is a kind of a license plate—be affixed to the jukebox. The Office believes that the present system is really quite easy to administer. The elimination of the affixation requirement, however, would complicate the enforcement of the license conditions and for that reason we oppose that, also.

Finally, section 3(c)(3) of the bill ostensibly provides forgiveness for infringements of copyrights by previously non-licensed jukeboxes. If that is the purpose of the section, and I am not sure that is, then it would provide another kind of subsidy to the user and, in our view, would also penalize those who have complied with the law and have paid the royalty in the past.

Thank you, Mr. Chairman. If you have questions, I will attempt to answer them.

[Material submitted for the record follows:]

PREPARED STATEMENT OF DAVID LADD

Today's hearing considers S. 1734, the "Coin-Operated Phonorecord Player Copyright Act of 1983." The purpose of the bill is to modify the compulsory license of the copyright statute for the public performance of nondramatic musical works on jukeboxes. (The term for jukebox used in the statute is coin-operated phonorecord player.) The salient feature of the bill substitutes a one-time, statutorily set royalty for the license in lieu of the present annual royalty, periodically adjusted by the Copyright Royalty Tribunal (CRT).

At the outset, some brief notes on the history of the performance right in U.S. copyright, and of that right as applied to jukeboxes are helpful. So also will be a brief explanation of the terms of the present statutory license; how the jukebox license is administered; and the respective roles of the Copyright Office and the CRT in that administration. (The Copyright Office and CRT are separate agencies.)

For decades after enactment of the Copyright Act of 1831, which first granted copyright in music, copyrighted musical works were protected only against the unauthorized reproduction of sheet music. Although a performance right in dramas was enacted in 1856, no separate performance right in music existed until 1897. By the turn of the century, coin-operated piano players and similar penny parlor machines were common and popular. The major revision of our copyright law in 1909 (the last comprehensive revision until the Copyright Act of 1976) exempted performance of musical works by coin-operated machines from copyright liability unless admission was charged to the premises where the performing machine was located. When jukeboxes appeared on the scene in the late 1920s, the statutory exemption in section 1(e) of the Copyright Act of 1909 was deemed broad enough to exempt them as well as the piano players in penny parlors.

There were numerous efforts in the period 1926-1976 to repeal what had become known as the jukebox exemption, but none succeeded. In settling the provisions of the Copyright Act of 1976, however, the jukebox industry agreed to the compromise embodied in section 116 of the Act. That section subjects certain public performances by means of jukeboxes to copyright liability, and at the same time extends a statutory compulsory license to those performances. Under that license, authors and copyright owners cannot forbid such performances of their musical works: the statute gives the jukebox operators upon compliance with certain conditions--"Filing the application [for the license], affixing the certificate [to the jukebox], and paying the royalty provided ..." §116(a)(2)--a compulsory license to perform copyrighted nondramatic musical works on the licensed machine. In other words, the jukebox operator obtains a kind of "license plate."

The initial royalty rate was set by the statute. The statute also provides for periodic adjustment of the royalty rate by the CRT. 1/ The Copyright Office, through its Licensing Division, collects the royalties and issues the "license plates." The Copyright Office has no role in setting the rates.

The CRT also, where the parties cannot agree on the distribution of the royalties collected by the Copyright Office, decides how those royalties will be distributed. The royalties are distributed as the CRT decides.

The annual royalty initially set in the statute was $8.00 per jukebox. The CRT, under its charge to adjust the jukebox royalty periodically, handed down its first decision doing so in January, 1981. In it, the CRT decided to adjust the annual royalty rate from $8.00 per box to $50.00 per box. (Two Commissioners published separate conclusions calling for a higher annual royalty rate.) However, in an effort to ease the impact of the new rate, the CRT decided to implement the rate adjustment on a staggered basis. Accordingly, the annual royalty rate for public performances during 1982 and 1983 was set at $25.00 per box. The rate then increased for 1984 to the

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1/ The rates as adjusted by the CRT shall, according to §801(b)(1), "be calculated to achieve the following objectives:

> "(A) To maximize the availability of creative works to the public;
> "(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
> "(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;
> "(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

$50.00 figure. Finally, the CRT determined that the $50.00 rate should be adjusted, effective January 1, 1987, to reflect changes in the Consumer Price Index between February 1, 1981 and August 1, 1986. The CRT decision was later affirmed by the Court of Appeals for the Seventh Circuit. 2/ In its principal provision, S. 1734 would convert the thus adjusted annual royalty rate for jukebox licenses to a one-time payment of $50.00.

This statement, dealing with that and other provisions of the bill, is divided into five parts:

(1) Summary of the Copyright Office position;

(2) Review of experience of the Copyright Office under the license;

(3) Comments and recommendations on S. 1734; and

(4) Final remarks

1. Summary of the Copyright Office Position

The Copyright Office has, in appearing on other legislation, 3/ expressed its preference for voluntary contractual arrangements -- that is, the market -- for exploitation of copyrighted works, and the view that compulsory licensing systems should be employed sparingly and only where the market cannot work. Performance rights in music, including those for jukebox performance, are usually licensed abroad in voluntary agreements between collecting societies and users, much as broadcast performance rights are licensed in the United States. There is no present proposal from any quarter, however, to abandon the compulsory license for jukeboxes. S. 1734 assumes continuation of the compulsory license of §116. The principal change to §116 proposed by S.1734 is replacement of royalty payments by jukebox operators -- presently at $50.00 per box annually -- with a one-time $50.00 payment by importers and manufacturers of jukeboxes.

The Copyright Office takes no position on the proposed modification. The Copyright Office believes voluntary arrangements in private agreements are

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2/ Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F. 2d 1144 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982).

3/ Oversight of the Copyright Act of 1976 (Cable Television): Hearings before the Committee on the Judiciary, 97th Cong., 1st Sess. 3, 151 (Serial No. J-97-20) (Statement of David Ladd); Copyright Infringements (Audio and Video Recorders): Hearings before the Committee on the Judiciary, 97th Cong., 2nd Sess.356 (Serial No. J-97-84) (Statement of David Ladd).

preferable to compulsory license because they allow the public, in the mechanism of the market, to establish by consumer choice the value of the works. Congress has in several instances, however, employed the compulsory license -- the mechanical license for nondramatic musical works in phonorecords (§115), the cable license (§111), and use of certain works in noncommercial broadcasting (§118) -- as well, of course, as the jukebox license (§116).

When compulsory licenses are employed, the Copyright Office favors royalty rates approximating market rates as nearly as possible, as a means of allowing market-like allocations of value.

Section 116 originally set the jukebox annual royalty rate at $8.00. In its first rate adjustment, the CRT arrived at the higher annual royalty rates in reliance on "marketplace analogies." To the extent that compulsory licenses employ royalty rates below those which would have been reached in voluntary negotiations -- whether established by the market itself or in a proceeding aimed at approximating market rates -- the submarket rate represents a subsidy to some user. There is some suggestion in the legislative history that the Senate Committee on the Judiciary viewed the initial statutory rate of $8.00 as a submarket rate. [4] But whenever the purpose or the likely effect of legislation is to extend a subsidy, it is appropriate for Congress to consider what is the need for it, for whom is it intended, how much is it, what is the economic or social purpose for it, and what is the likelihood that the subsidy will reach the intended beneficiary. Subsidies in compulsory licenses do not, of course, come from public funds but are the transfer of value from one private interest to another.

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[4] In its 1975 Report on Copyright Law Revision, the Committee said:

> This committee in 1958 recommended an average annual per box payment of $19.70. The most recent hearings on the jukebox question did not provide any indication that the committee's decision in 1958 was unwise or the rate of payment unreasonable. In providing in this legislation for a total payment of $8.00 per box the committee has been greatly influenced by the desire to conform to the rate provided in the copyright legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, the committee has endeavored to facilitate the progress of this legislation by preserving, to the extent possible in view of the other provisions of this bill, the rate adopted by the House of Representatives during the 90th Congress.

S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) at 96-97.

Thus, once the principle of market-governed distribution is abandoned, and the question becomes what size subsidy should move from authors and other copyright owners, the Copyright Office offers no special expertise and therefore no opinion. In most cases such questions historically seem to have been resolved in compromise, and not upon any economic analysis or certitude.

Other provisions of S. 1734 enlarge the scope of the compulsory license, complicate its administration and enforcement and arguably forgive previous infringements. As will be discussed in greater detail, the Copyright Office opposes these changes in the jukebox compulsory license.

2. Review of Experience of the Copyright Office Under the License

The Licensing Division of the Copyright Office collects the statutory royalties and issues the jukebox license certificates. As the chart on the following page shows, the number of jukeboxes licensed has decreased from year to year since the compulsory licensing system became effective on January 1, 1978.

It is difficult to determine the actual number of jukeboxes in operation in the United States. (This difficulty may be compounded since the definition of "coin-operated phonorecord player" is limited in section 116(e) of the statute by various conditions, including the box's location in "an establishment making no direct or indirect charge for admission.") Nevertheless, several figures have been employed to estimate the number of jukeboxes in operation. During the floor debate on the issue in the Senate on

Year	Annual Royalty Rate	Jukebox Certificates Issued	Fees Collected 5/
1978	$ 8.00	143,396	$1,149,160.16
1979	$ 8.00	138,180	$1,100,909.06
1980	$ 8.00	137,209	$1,095,519.50
1981	$ 8.00	135,396	$1,076,010.90
1982	$25.00	126,717 6/	$2,902,904.86
1983	$25.00	114,122	$2,860,953.00
1984	$50.00	91,263 7/	$4,515,919.00

February 19, 1976, the figure was estimated at 450,000 machines. 8/ In 1980, the Amusement and Music Operators Association (AMOA) estimated the number to be somewhere between 251,000 and 388,000 machines. 9/ Finally, an article in a recent issue of Playmeter, a trade magazine for the coin-operated machine industry, estimated that approximately 300,000 machines presently are in operation. 10/ Although these figures do vary widely, it is clear that by any

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5/ These figures are accurate as of June 8, 1984. The amount of fees collected does not include interest earned nor does it reflect the deduction of the Office's reasonable operating costs under the license. Any deviation in fees collected and certificates issued is due to: (1) the variance in the number of full-year and half-year licenses applied for; and (2) license applications processed within the Licensing Division but where certificates have not yet been issued.

6/ Although 126,717 machines were licensed during 1982, only 110,154 of these machines were licensed at the adjusted rate of $25.00. As a result of the affirmance of the CRT rate adjustment in April, 1982, the Licensing Division contacted all jukebox operators who submitted license applications for 1982 and requested payment of an addition $17.00 per box (to reflect the adjustment from $8.00 to $25.00). A total of 511 jukebox operators did not submit the additional $17.00 for each of 16,563 jukeboxes. An unknown number of operators who did submit the additional fee did not pay for certain machines which they indicated had not been in operation at any time during 1982.

7/ The 1984 license year has not yet ended. Based on the number of machines licensed during 1983 and taking into account the 10% decrease in licensed machines between 1982 and 1983, the Copyright Office estimates that 102,710 jukeboxes will be licensed during 1984. This estimate does not, however, take into account other factors which may be attributed to the increase in the royalty to $50.00 per box.

8/ 122 Cong. Rec. 3824 (1976) (statement of Sen. Hollings).

9/ 46 FR 884 (Jan. 5, 1981) at 886.

10/ Playmeter, April 15, 1984 at 46.

of these estimates, compliance with the existing compulsory license by the jukebox industry has been poor. The AMOA has, even so, vigorously attempted to inform jukebox operators of their obligations under the copyright law.

3. Comments and Recommendations on S. 1734

The following are comments and recommendations of the Copyright Office on S. 1734.

a. Extension of the Compulsory License

Section 116(e)(1)(B) presently limits the applicability of the compulsory license to performances in establishments "making no direct or indirect charge for admission." This provision tracks the scope of the jukebox exemption under section 1(e) of the 1909 copyright law. Even under that law, jukebox performances at a location "where a fee is charged for admission" was subject to full copyright liability. The proposed definition of "coin-operated phonorecord player" contained in S. 1734 removes this limitation and thereby extends the compulsory license markedly beyond its present scope. This broadening of the license invades the basic area of what has been regarded as the performance right, and the Copyright Office opposes it.

b. Affixation of Jukebox Certificates

Section 116 presently conditions the jukebox compulsory license upon the jukebox operator affixing the license certificate to the particular phonorecord player. Failure to affix forfeits the license and renders the public performances of copyrighted music on that phonorecord player actionable as an infringement. This requirement is important to the enforcement of the compulsory license. By the certificate, or its absence, the licensing status of a particular box can be instantly determined.

S. 1734 would eliminate this affixation requirement, and its elimination will predictably complicate enforcement.

The "findings and declarations," comprising Section 2 of S. 1734, include the statement that:

> the current compulsory license system for

> coin-operated phonorecord players is difficult to administer, to comply with, and to enforce.

The current jukebox license is simple to administer and to comply with. Copyright owners may presently have problems with respect to enforcement of their rights under §116, but removing the requirement for affixing the certificate will aggravate these problems, not reduce them.

c. Forgiveness for Previous Infringement

As already stated, compliance with the present compulsory licensing requirements by jukebox operators has not been good. S. 1734 states that:

> Any operator who complies with the provisions of this subsection shall be assessed pursuant to paragraph (4) only and shall not, by reason of such compliance, be subject to liability under chapter 5 of this title or under any other law for failing to obtain a compulsory license for any year or lesser period of time prior to the effective date of this section.

It can be argued that this provision forgives jukebox infringements for previous years in which there was a legal obligation to comply with the compulsory license. If that is not the purpose of the section, its actual purpose is unclear.

If Congress elects to forgive past infringements, the legislative history, including the report on the bill, should make that purpose clear, and the constitutionality of this provision should be examined. This forgiveness would, of course, represent another kind of subsidy, and in excusing infringers, penalize those who complied with the law. As a matter of equity and policy, the Copyright Office would oppose it.

d. Comparison and Contrast of S.31 and S.1734.

S. 1734 has a pattern like S. 31, the "Home Recording Act 1983." (S. 31 would grant a compulsory license to manufacturers and importers of tape and tape recorders for use in home taping of copyrighted works.) There are, however, two significant differences in these bills. First, S. 31 provides for a royalty set either through voluntary negotiation or arbitration which is then subject to triennial adjustment by the same process to reflect changed circumstances; the royalty rate governing jukebox performances is statutorily set in S. 1734, and there is no provision for further adjustment. Second, S. 31 reflects the continuing use of copyrighted works under the license by imposing a royalty on blank tape; S. 1734 is based on a one-time up-front payment for all subsequent performances by means of the particular licensed jukebox.

4. Summary

S. 1734 proposes to leave the compulsory license for jukeboxes in place, but to substitute a one-time statutorily set royalty of $50 for the present $50-per-year royalty, which is periodically adjusted.

The Copyright Office prefers private contract to compulsory licenses; but once the compulsory license is chosen, the Copyright Office believes that the statutory rate should aim to approximate what the market rate would have been.

Congress may by compulsory licenses subsidize users at the expense of the copyright owners; but this course, and the size of the subsidy, are essentially political and social-value judgments upon which the Copyright Office offers no expertise. However, even if the Congress determines that a subsidy is appropriate, the Copyright Office urges that it be accomplished through minor modifications to section 116.

Thank you for this opportunity to appear before you, and I will be pleased to answer any questions you may have now or in the future.

The Register

1984 AUG 14 PM 3:12

August 10, 1984

The Honorable
Charles McC. Mathias, Jr.
United States Senate
387 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Mathias:

This is in response to your letter dated July 16, 1984, requesting the views of the Copyright Office on possible alternative methods of collecting jukebox royalties under a compulsory licensing mechanism. Before responding to your specific questions, let me make several preliminary points.

First, given the estimated number of jukeboxes presently in operation, it appears that compliance with the existing compulsory license by the jukebox industry has been poor. Accordingly, it is both appropriate and desirable that your Subcommittee explore ways of improving compliance, thereby providing composers of nondramatic musical works with the intended compensation due them for this commercial exploitation of their works.

Second, during the revision process leading to enactment of the Copyright Act of 1976, Congress considered various means of payment by jukebox operators for public performances on their machines. These included: (1) compulsory arbitration; (2) compulsory licensing with per-box maximum; (3) compulsory licensing involving affixation of stamps; and (4) compulsory licensing with a fixed fee per record purchased. Ultimately, Congress settled on the present system, which recognizes the historical and traditional principle of compensation for repeated performances of copyrighted works; it does so through payment of annual fees which are intended to compensate copyright owners for performances during that particular license year. Establishment of any scheme premised on a one-time payment, therefore, should be carefully scrutinized to consider whether the benefits derived from such a system warrant what may be viewed as a pronounced departure from this principle.

Third, as I stated during the June 20, 1984, hearing on S. 1734, the Copyright Office prefers private contract to compulsory licenses; but once the compulsory license is chosen, the statutory rate should aim to approximate what the market rate would have been. While Congress may decide to employ compulsory licenses to subsidize users at the expense of copyright owners, this course, and the size of the subsidy, are essentially political and social-value judgments upon which the Copyright Office offers no special expertise. However, for purposes of responding to your questions, I will assume that they are asked in the context of seeking methods of collecting royalties at rates which approximate market rates.

The three proposed methods outlined in your letter and the views of the Copyright Office with respect to each of them follows:

1. Inclusion of a "performance right fee" in the price of recordings used in jukeboxes. (Obviously, some method would need to be found to avoid imposing this fee on non-commercial purchasers of recordings.) This approach has the advantage of eliminating the need for continuing government intervention by the Copyright Office and the Copyright Royalty Tribunal in the collection and distribution of the jukebox royalties respectively. However, it is premised on a one-time charge per recording and may not necessarily correlate to the level of public performances of the recording by means of jukeboxes; some songs may be performed infrequently, if at all, while others may become standards, such as "White Christmas" and "Strangers in the Night," whose performances may continue indefinitely. Further, tying the royalty to the purchase of each recording may create a financial disincentive on the part of the operator to update the records contained in the jukebox. This approach, therefore, would be less flexible than the present system which provides a "blanket-type" compulsory license covering any and all recordings contained in the jukebox regardless of the frequency with which recordings are replaced on the machine.

Finally, while this approach, at first blush, may appear to afford greater compliance by jukebox operators with the compulsory license, it is not clear whether it would, in fact, achieve this purpose. Part of the reason is identified in your question when you state that "[o]bviously, some method would need to be found to avoid imposing this fee on non-commercial purchasers of recordings." Aside from the obvious difficulty faced in the creation of such a system, the potential ability of a jukebox operator to purchase "exempt" recordings, thereby avoiding the "performance right fee," will be present. And, once the recordings are placed in a particular jukebox, it will be a formidable, if not impossible, task for copyright owners to assess the level of compliance for purposes of enforcing their rights.

2. Imposition of a one-time royalty fee on jukeboxes, paid by the manufacturer or purchaser. This one-time fee would amount to a payment in advance of the annual fees now paid by

jukebox operators. (S. 1734 proposes such a fee, but the amount of that fee could be different than that proposed in S. 1734.) This fee could be fixed permanently, or adjusted from time to time by a federal agency. Unlike the first proposal identified above, this approach would not eliminate the role of the government in collecting and distributing the royalties. On the other hand, as I said during my testimony in June when responding to a similar question raised by Senator Zorinsky:

> Looking solely at the point of ease, facility, and low expense of collection, a one-time collection clearly is simpler. However, the offsetting consideration is how are you going to assess the value of the work which is used.
>
> If you try to look into the future and try to capitalize, at the moment of the manufacture or sale of the machine, what the value of the performance of the music will be on it throughout its life, it is going to be a very difficult task. In any event, the sum might be so large that it would be unacceptable as an initial payment.

Compliance under this approach would be further enhanced if the system were to incorporate a procedure similar to that employed in section 115(c)(3) with respect to the mechanical compulsory license. This provision requires a compulsory licensee to furnish to the copyright owner a detailed cumulative annual statement of account, certified by a certified public accountant. For purposes of the jukebox compulsory license, filing the certified statement of account with the Copyright Office, rather than with individual copyright owners as under section 115, would achieve the same purpose.

Notwithstanding the potential benefits which accrue from this proposal, there are several drawbacks. Your letter does not indicate how royalties would be distributed under this approach. It certainly would be inequitable to distribute all of the collected royalties upon their receipt since this would eliminate payments for performances of songs on the jukebox which are created after the royalty distribution. This result could be avoided, however, by implementing a system of staggered royalty distribution. For example, if we assume for the sake of illustration that a jukebox has a useful life of ten years, the royalties could be placed in a trust fund with annual distribution equalling 10% of the royalties plus accumulated interest.

Another drawback already mentioned is that the system is based on a one-time payment (although the proposal indicates that this payment would be intended to reflect "payment in advance of the annual fees now paid by jukebox operators".) Since an equitable royalty may be so large as to be unacceptable as an initial payment, it may be desirable to consider a modification of the proposal to reduce the initial payment, and then require jukebox operators to continue making royalty payments on an annual or other basis. In this manner, the principle of payments based on repeated performances would be maintained, compliance would be enhanced since particular machines would be identified at the time of their manufacture and sale, and inequities that may result in royalty distribution.

3. A pay-per-use system, in which jukebox operators would compensate songwriters based on the number of times that a jukebox is actually used. Even if we assume that the pay-per-use system contemplated here is under a compulsory license with a government-set rate, the proposal appears to correlate clearly to the principle of payment for performances as they take place. However, putting a system along these lines in place may impose significant reporting and monitoring burdens on jukebox operators. One of the benefits of both the present jukebox compulsory license and blanket licensing, the latter of which is utilized by the performing rights societies pursuant to Department of Justice antitrust consent decrees, is that they reduce the potentially high transaction costs that could be incurred in direct licensing, on a song-by-song basis, of public performances of nondramatic musical works. A pay-per-use system may eliminate these advantages. It may also create difficulties in terms of enforcement since it is not clear how copyright owners would be afforded the opportunity to monitor the particular performances and assure that they are, in fact, reported in the determination of the royalty payments. On the other hand, if the pay-per-use system is employed in marketplace negotiations rather than by compulsory licensing, it is likely that these potential difficulties can be resolved during negotiation between the parties of the necessary licenses.

We hope these answers will be useful. As always, the Copyright Office stands ready to provide additional assistance as needed.

Sincerely,

David Ladd

David Ladd
Register of Copyrights

Senator Mathias. Thank you, Mr. Ladd.

In your statement you indicate that in 1984 the royalty rate generated $4,515,919.

Mr. Ladd. That is an interim report, Mr. Chairman. The Office should receive some additional royalties during, the second half of 1984.

Senator Mathias. But in 1978, which I assume is the final figure——

Mr. Ladd. Yes.

Senator Mathias. The fee that was collected was only $1,149,160.16.

Mr. Ladd. That is correct.

Senator Mathias. And in 1983, it had only gotten up to $2,860,953.

Mr. Ladd. Yes, and you will notice, Mr. Chairman, that the number of machines registered declined between 1978 and 1983.

Senator Mathias. My question is a somewhat philosophical one. These are large figures to us as individuals—beyond the dream of avarice as far as I am concerned. But in national terms it is pretty small change. How can an issue, which in relative terms is so small, go on and on and on? Why does this issue stay with us so long? What is it about it that keeps us glued to this subject? It isn't the money. It is difficult to believe that it is the money.

Mr. Ladd. The answer to your question, in large part, is that it is historical. During the interval from the emergence of jukeboxes on the commercial scene in force in the late 1920's until the comprehensive revision of the statute in 1976, liability for performances on jukeboxes was a continual and hotly debated subject. There have been comparable degrees of outrage on both sides, and what we are dealing with here today in part is the legacy of that long controversy over that long period of time in which feelings have hardened, with no perceptible softening.

Senator Mathias. So what you are saying is that this may be the rare case, the almost unique case, in which they say, "It isn't the money, it's the principle of the thing," and they really mean it.

Mr. Ladd. I am not in a position to answer that, but it sounds to me like a reasonable proposition.

Senator Mathias. Of course, copyright gives to the creator a degree of control over the recording, but not over who may play it. If it is a printed work, the author has some control over who publishes it. He doesn't control who may read it.

Mr. Ladd. He has total control over who publishes it.

Senator Mathias. He has total control over who publishes it, but he cannot control who reads it.

Mr. Ladd. That is right.

Senator Mathias. Before the 1976 act, the creator, the composer, had some control, I assume, over the recording, but not over who played it, or how it was played.

Mr. Ladd. Prior to 1976, the composer had no control over who played the music on the jukebox. He did have some control over the recording of his work because of the mechanical right.

Senator Mathias. Control ended with the recording, just as a writer's control ends with the publishing.

Mr. LADD. Yes, with respect to jukebox performances. We are talking about two different rights: the reproduction right and the public performance right. I think that is of some importance.

Senator MATHIAS. That is really the point of my question. What are the special conditions under which parties contract for the right to publicly perform musical compositions in the absence of a compulsory licensing scheme?

Mr. LADD. Let me answer that very briefly.

Senator MATHIAS. That is really what I am getting at.

Mr. LADD. First, the act generally gives the composer the right to control the reproduction and public performance of his works. Once the work is first recorded and distributed, however, the mechanical compulsory license comes into play. In a very significant sense at that point, the composer loses control over who can record his work. But he does have the right to compensation for that recording under the mechanical license.

Prior to 1978, while the composer would have received royalties for recordings made under the mechanical license, he did not receive anything at all for the public performance of his work in jukeboxes. The 1976 act extended liability, effective January 1, 1978, for the public performance of nondramatic musical compositions on coin-operated phonorecord players, but limited the composer's rights through the compulsory license at a rate originally set in the statute and subsequently adjusted by the CRI.

I hope I haven't given you a longer answer than you wanted.

Senator MATHIAS. No. I think we need to put this whole subject into context. You referred to the background of the establishment of the $8 annual rate. Was there, at the time that rate was established, any consideration given to a one-time fee, as is contemplated in the bill?

Mr. LADD. Let me ask Dorothy Schrader to answer that question.

STATEMENT OF DOROTHY SCHRADER

Ms. SCHRADER. I don't recall the specific proposals. This matter was considered over many decades, and certainly during the consideration of the general revision there were several proposals for establishing the royalty fee. I assume that at one time there was a proposal for a one-time fee, although I don't recall it exactly.

Once the tribunal concept was established for the other compulsory licenses, especially cable retransmissions of copyright works, it seemed logical and fair that there be a periodic review of the rates. This function was then entrusted to the Copyright Royalty Tribunal so that the rate would not be frozen at 1976 levels, as was true, for example, in the case of the 1909 compulsory license for the mechanical reproduction of music. That rate was frozen at 2 cents per recorded song for nearly 70 years.

Senator MATHIAS. Senator Metzenbaum.

Senator METZENBAUM. There are 102,000 machines that you anticipate will be licensed during 1984. How many owners?

Mr. LADD. I don't know.

STATEMENT OF DAVID E. LEIBOWITZ

Mr. LEIBOWITZ. I believe there are approximately 511 jukebox operators.

Senator METZENBAUM. When it comes to distributing the money, how do you go about doing that?

Mr. LADD. The royalties are distributed as the CRT directs. As a practical matter, it has been done in large part by agreement among the distributees. If a controversy exists about the distribution of the royalties, then allocation and distribution is ordered by the CRT at the conclusion of a royalty distribution proceeding.

Senator METZENBAUM. And how is the money distributed? Who are the recipients?

Mr. LADD. For the most part, the collecting societies: ASCAP, BMI, and SESAC.

Senator METZENBAUM. Does the Government monitor, or know, how the money is thereafter divided by those three organizations?

Mr. LADD. I do not believe so, Senator. There will be witnesses from the performing rights societies who may better respond to the division of royalties within the society.

Senator METZENBAUM. Has the Government had any complaints or questions raised with respect to the method of distribution?

Mr. LADD. Not to my knowledge. There is, of course, the historical antitrust case involving ASCAP which resulted in a consent decree. This consent decree, in modified form, still governs the operation of that society. You may wish to ask the representative of ASCAP about the consent decree. He can tell you more in detail about that, but in answer to your specific question, "Has the Government raised any questions about the distribution of its recepts within its membership?" I don't know of any.

Senator METZENBAUM. What percentage is distributed to each of the three organizations?

Mr. LADD. I do not have the specific percentages.

Senator METZENBAUM. Does the CRT give a third to each of the organizations, or what is the ratio?

Mr. LADD. I would ask you, Senator, to ask the witnesses from the societies. Although I do not recall what the specific distribution was, I do know that it was not equal.

Senator METZENBAUM. Who made that determination?

Mr. LADD. The CRT.

Senator METZENBAUM. And the CRT's relationship with your office is what?

Mr. LADD. They are an entirely independent agency.

Senator METZENBAUM. Do you know what the best-paid copyright holder or best-paid performer could hope to get as a return on these royalties on an annual basis, and how does that actually compare with the earnings from sales of albums and so forth?

Mr. LADD. We have no information of that kind in the Copyright Office.

Senator MATHIAS. If I could interrupt, and this can be elaborated upon, the basic principle is market analysis.

Mr. LADD. I understand that surveys provide the information concerning what records are played most often.

Senator MATHIAS. The best statistics possible are collected, and then the decision is made.

Mr. LADD. I am sure you know, Senator, that with respect to the licensing of the broadcast performances of nondramatic musical works, royalty distribution is based, in part at least, upon a statistical sampling of actual performances.

Senator METZENBAUM. If statistical sampling is as accurate as political polls, somebody is getting shortchanged.

I have no further questions.

Senator MATHIAS. Senator Zorinsky, did you have a question?

Senator ZORINSKY. Mr. Chairman, I would like to ask if the 500-some odd figure of operators that was asked earlier are not individuals that own their own jukeboxes, say, if I went into the tavern business and decided I didn't want an operator and I bought my own jukebox, wouldn't I be subject to this, also?

Mr. LEIBOWITZ. Senator, I am glad you raised that 511 figure again. That figure was referring only to the number of jukebox operators in 1983 that did not pay the additional amount of the adjusted royalties. There are many more jukebox operators in the United States than represented by the 511 figure. We do not have that number here, but we will try to obtain it for you.

Senator ZORINSKY. How about individual locations?

Mr. LEIBOWITZ. I do not have that information here, but we will try to ascertain that for you and add it to the record.

[Subsequent to the hearing, the following material was received for the record:]

THE REGISTER,
U.S. COPYRIGHT OFFICE,
LIBRARY OF CONGRESS,
Washington, DC, July 18, 1984.

Hon. CHARLES McC. MATHIAS, Jr.,
U.S. Senate,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR MATHIAS: This letter responds to the question presented to the Copyright Office by Senator Edward Zorinsky during our testimony of June 20, 1984, on S. 1734, the Coin-Operated Phonorecord Player Copyright Act of 1983. Specifically, Senator Zorinsky asked how many jukebox operators own a single machine in individual locations.

The present Copyright Office automation system administering the jukebox compulsory license is not able to yield that specific information. The system is based on the number of jukebox license accounts which generally approximate the total number of jukebox operators whose boxes are licensed in the United States. However, some operators may license jukeboxes in different times of the year, thereby creating separate accounts. For this reason, the Office estimates that the following information on jukebox operator accounts for the years 1978 through 1984 represents, within 10 percent of the actual figure, the number of jukebox operators complying with the compulsory license:

[Jukebox operator accounts]

Year:	
1978	4,281
1979	3,918
1980	4,046
1981	3,920
1982	3,996
1983	4,054
1984 (to date)	3,189

We hope this information will be useful. As always, the Copyright Office stands ready to provide additional assistance as needed.

Sincerely,

DAVID LADD,
Register of Copyrights.

Senator **ZORINSKY**. I do not know how anybody would have that information.

Mr. **LEIBOWITZ**. Generally, a single jukebox license application is submitted by the operator which covers all the jukeboxes he owns. So, individuals who only own one jukebox would submit an application for that one box. We might be able to get that information later for you.

Senator **ZORINSKY**. Well, I would think it would be a mind-boggling experience if in fact there are 60,000 jukeboxes left and beyond that there are maybe another 20,000 that aren't reported, and beyond that there are another 20,000 who are individually owned, for instance, every time a place opens up they have the option of buying their own, or calling an operator and say, "Bring me one."

I would think that that would be just an astronomical sum to keep track of all over the continental limits of the United States of America.

The question I would ask, mechanically wouldn't it be much easier to stand at the end of an assembly line in the two factories that are left in this country?

I mean like at the end of the General Motors assembly line, as something comes off, whether it be $50, $100, or whatever the negotiation price is, to get it there. The cost of collection has to come off somebody's—you know, to drive a car, to take a plane to a city to check the boxes and find out they close at 6 o'clock in the evening, you have to go back tomorrow, and go get a hotel room for $80 tonight, to eat the meals. All these things, I know what expenses are in traveling, and it has to be a tremendous burden to check that number of individual locations to see whether they have qualified for obtaining that.

The question I ask is, would it not be easier for you to police a payment of that type at the end of an assembly line?

Mr. **LADD**. First, the Copyright Office does not police anything under the present law. If there is any policing done, it is done by the copyright owners acting on the presence or absence of the license certificate on a particular machine.

Looking solely at the point of ease, facility, and low expense of collection, a one-time collection clearly is simpler. However, the offsetting consideration is how are you going to assess the value of the work which is used?

If you try to look into the future and try to capitalize, at the moment of the manufacture or sale of the machine, what the value of the performance of the music will be on it throughout its life, it is going to be a very difficult task. In any event, the sum might be so large that it would be unacceptable as an initial payment.

That, of course, is the advantage of a continuing royalty because it is a continuing reading and measurement of use. But the answer to your question is, solely in terms of ease of collection, yes, the one-time payment is easier.

Senator ZORINSKY. Is not the determination as to how successful the writer of the song is—I mean, in other words, if it is a successful song I assume he gets paid more, and if it is not a hit record, he doesn't, or she doesn't get paid?

Mr. LADD. I know enough about it in gross to answer that question "yes." As a principle, that is true.

Senator ZORINSKY. The same is being charged radio broadcasting stations, also, for playing those records over the air. Now, I know it is not a secret that these writers and composers used to knock on our door all the time, "Please put my record on the jukebox so it will become popular, so I can go on a tour and make $10,000 for each appearance," and then once the jukebox people and the radio-broadcasting people made Frank Sinatra's records famous, then he could go out and sell tickets for $40 apiece for people to come to see him.

Now, how, you know, if you carry this philosophy one step further, possibly the jukebox industry and the radio broadcasting industry ought to be remunerated based on the success that they create for some of these by the exposure they give to some of these artists and composers.

Mr. LADD. That argument has been frequently made in other contexts.

Senator ZORINSKY. Well, it is for real. Payola indicted many people who were slipping money under the table trying to get people to play their records.

Certainly, I don't know what determines a hit record—timing, or a catchy tune, or you are in the right place at the right time—but certainly some records go and some don't. In most instances, it depends on the exposure that the record gets to the public, because that is where the money is.

Mr. LADD. I believe the film the "Coal Miner's Daughter" reflects the thought, that, among other things, that exposure frequently dictates popularity.

Senator ZORINSKY. Thank you.

Senator MATHIAS. Thank you very much.

Mr. LADD. Thank you, Mr. Chairman. It was a pleasure to be here.

Senator MATHIAS. Our next witness is the the Commissioner of Patents and Trademarks, the Assistant Secretary of Commerce, Mr. Mossinghoff, also a frequent visitor to this committee, and always welcome.

Please come forward, Mr. Mossinghoff.

STATEMENT OF HON. GERALD J. MOSSINGHOFF, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, PATENT AND TRADEMARK OFFICE

Mr. MOSSINGHOFF. Thank you, Mr. Chairman. I welcome this opportunity to appear before you today to testify on S. 1734, the so-called jukebox bill. I will at this point merely summarize some of the points made in my prepared statement, Mr. Chairman, in line with your request.

The proposed legislation would significantly change the present copyright law. It would establish a new approach to dealing with payment for the public performances of works protected by copyright.

At present, the copyright owner is compensated for the public performance of his or her work on a basis that is keyed, in one fashion or another, to the use of that work. That is true whether the use is made pursuant to one of the present compulsory licenses in the law or, more generally, to freely negotiated voluntary licensing agreements.

The present bill would establish a one-time payment that appears simpler to administer, and to offer a new approach to an old and enduring problem. But in spite of the newness of the approach and the attractiveness of possible simplified administration, the administration cannot endorse S. 1734.

Mr. Chairman, you have heard, I am sure, and will hear later today the arguments on both sides of the legislation, and with your permission I would skip those. I have summarized them as we view this situation in the Department of Commerce. I will move on to page 4.

In my view, the arguments on both sides somewhat miss the main point, that we see, anyway, and that is that the real issue put forth by this bill and called into question is the challenge to the economic structure and basis of the copyright system.

Authors, composers and other copyright owners, who only add to the well-being and enjoyment of society, should be entitled to reasonable compensation for their contributions to society. In general, this administration prefers to see the level of compensation paid to the creators of intellectual property, whether it is copyright, inventions, or trade secrets, set through the free market mechanism that is the keystone of American prosperity.

If that can't be done, however, and in this case the Congress decided after long debate that a compulsory licensing provision should be done, we think the free market approach, or market approach, to setting the rates should be adopted, and we believe they were in the Copyright Royalty Tribunal's decision.

Mr. Chairman, one of the many good things about my job is that I do not get involved in setting rates for jukeboxes. We did have, however—I am not an expert on copyright law— but we have, however, reviewed thoroughly the decision and work of the Copyright Royalty Tribunal, the extensive judicial review of the seventh circuit, and we are satisfied that the Copyright Royalty Tribunal faithfully used the four criteria set forth in its charter in setting these rates.

As I noted, the Seventh Circuit Court of Appeals agreed with the CRT indicating, and I think it worth quoting here, since no one else has this morning:

> Ratemaking is an art, not a science. We believe that the Tribunal did not act either unreasonably or unlawfully by establishing a $50 royalty fee which would be implemented in stages and be subject to future inflationary adjustments. The necessity of avoiding disruption within the jukebox industry justified the $50 royalty and its phased in implementation. On the other side of the coin, the Tribunal also recognized that a reasonable fee for 1980 might become so distorted by inflation before the next "scheduled" adjustment that the addition of an automatic inflation factor was necessary to achieve the goal of the Act to provide reasonable remuneration to copyright owners.

In summary, continues the court, "we find no fault with the Tribunal's final rule as promulgated."

Mr. Chairman, we find the logic of the CRT as affirmed in the court's decision persuasive. Congress in passing the 1976 copyright law determined that in fairness and the public interest, jukebox-owners should pay for their use of nondramatic musical works protected by copyright as do others who use these works.

The Seventh Circuit Court of Appeals agreed that basing the amount of that payment on a careful consideration of marketplace factors as they affect both copyright users and proprietors was appropriate.

The compulsory license does just that. It sets a rate and provides for its periodic adjustment. To adopt the proposal for a one-time $50 fee embodied in S. 1734 would destroy the present system and replace it with one that is, in my view, out of step with copyright policy, both past and present.

While we agree in principle with the position that jukebox operators should bear an obligation to make some continuing payment for the use of works protected by copyright, we are aware that there has been considerable controversy over the amount of the fee.

The proprietors of copyrights have argued that $50 is too low, and the operators have taken the position that in view of their data the fee is too high.

Based upon my reading of the CRT's decision and the Seventh Circuit Court of Appeal's opinion, I believe that the marketplace analogy was an appropriate way to approach the setting of the fee in view of the guidance in the legislative history.

Should the committee believe that factors other than the marketplace analogy should be included in the CRT's calculus, we would be pleased to review any such proposal. The administration does not support the one-time payment approach to compensating copyright owners that is an integral part of S. 1734.

Thank you Mr. Chairman.

[Material submitted for the record follows:]

PREPARED STATEMENT OF GERALD J. MOSSINGHOFF

Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to appear before you today to testify on S. 1734 -- the so-called "Jukebox Bill." The salient feature of this bill would be to replace the present $50.00 annual license fee paid by jukebox operators with a one-time $50.00 payment to be paid by jukebox manufacturers and importers. The bill also contains provisions for a one-time payment of up to $25.00 by jukebox operators for jukeboxes presently in service. These rates would not be subject to periodic review and adjustment by the Copyright Royalty Tribunal.

The proposed legislation would work a significant change in the present copyright law. It would establish a new approach to dealing with payment for the public performances of works protected by copyright. At present, the copyright owner is compensated for the public performance of his or her work on a basis that is keyed, in one fashion or another, to the use of that work; that is true whether the use is made pursuant to one of the present compulsory licenses in the law or, more generally, to freely negotiated voluntary licensing agreements. The present bill would establish a one-time payment that appears simpler to administer, and to offer a new approach to an old and enduring problem. But in spite of the newness of the approach and the attractiveness of possible simplified administration, we cannot endorse S. 1734.

The Copyright Law of the United States finds its source in the basic bargain embodied in Article 1, section 8, clause 8 of the Constitution. In order to promote the general welfare through the encouragement of the arts, authors, composers and other creative artists are rewarded with certain statutorily prescribed rights. One of those is the right to perform or to license others to perform publicly their musical works. Typically, since the days of composer Victor Herbert and his lawyer Nathan Burkan, the progenitors of American performing rights associations, this has been done through voluntary collective licensing arrangements administered by organizations like ASCAP, the American Society of Composers, Authors and Publishers; BMI, Broadcast Music, Inc.; and SESAC who collect royalties and distribute them to their members according to systems based on a variety of statistical and sampling mechanisms. Thus, creative artists have been rewarded in proportion to the joy and pleasure that their musical genius brings to the public. However, until the present copyright law came into force in 1978, creators were denied compensation for the use of their works in jukeboxes.

The musical artists' struggle to obtain compensation for the public performance of protected works by coin-operated machines has a long and arduous history. At the time of the passage of the 1909 Copyright Law, jukeboxes as we know them were unknown.

Beginning in the 1920's, the jukebox industry has grown and apparently prospered. The technology has kept pace with the times from 78 rpm disks and now to 45 rpm disks to considerations of using tapes and other advanced media. It is true that at present the jukebox industry has changed and evolved in ways that were unanticipated only a few years ago. One only has to visit a video arcade to see the video games gobble up quarters almost as fast as the characters in the game gobble up other characters on the screen. The present trade association, the Amusement and Music Operators Association, AMOA, represents in addition to jukebox owners, owners of vending machines, video games, pinball machines and other amusement devices. Competition for the public's quarters is severe and the jukebox segment of the coin-operated machine industry may have suffered from that competition. Any loses would seem to be due primarily to the public's changing tastes, technological progress, and complex socioeconomic forces.

I am a non-expert in copyright law, but I have learned that the debate that is focused by these hearings has been raging since the earliest days of the copyright revision effort. It is a debate that has shed little light on actual principles, but has generated a great deal of heat about the facts. The jukebox operators contend that the following factors ought to be considered: the jukebox industry is a declining business with the average operators in 1982 having 65 machines in service, down from 75 machines in 1979; the number of installed jukeboxes continues to fall due to the operators' inability to keep prices charged per play in step with inflation, competition from other means of entertainment and socioeconimic changes such as urban redevelopment, and the statutory royalty payment. Operators have also argued that copyright owners are already compensated from the royalties paid to them as a result of the 130 to 150 records that operators purchase per year for each jukebox. In short, the jukebox owners and manufacturers paint a picture of an industry in dire economic straits.

On the other hand, copyright owners contend that: the initial $8.00 per machine annual rate set by Congress in the 1976 Act was far too low and the present $50.00 per year fee prescribed by the CRT in its rate adjustment is still too low; there is no reason to single out jukeboxes from other users of protected works and provide them with a statutorily prescribed $50.00 one time payment in lieu of an annual fee based on use; and the contention that the jukebox business is in dire economic straits is not true.

In my view, some of these arguments miss the point. The real issue put forth by this bill is a challenge to the economic structure and basis of the copyright system: authors, composers and other copyright owners, who only add to the well-being and enjoyment of society, should be entitled to reasonable compensation for their contributions to society. In general, this Administration prefers to see the level of compensation paid to the creators of intellectual property set through the free market mechanism that is the keystone of American prosperity.

The alternative to setting levels of compensation through the free market mechanism is the application of a compulsory license system. In the area of compulsory licenses, the Congress has acted with great restraint, carefully balancing the interests of the creators and the users of works protected by copyright. The compensation paid under every compulsory license in place in the present United States Copyright Law is based on the use of the protected property. All of the statutorily prescribed rates are subject to periodic adjustment in acknowledgement that, in the real world, compensation must keep pace with changing economics. Congress created the Copyright Royalty Tribunal (CRT) to make those adjustments. On January 5, 1981, the CRT published its 1980 adjustment of the royalty rate for coin-operated phonorecord players, 46 F.R. 884 (January 5, 1981). That decision changed the statutory license rate from $8.00 per machine per year to $50.00 per machine per year. It provided a two-year phase-in provision of $25.00 per year for 1982 and 1983, with the full $50.00 per year fee becoming effective on Janury 1, 1984. There is also a provision for an adjustment of the $50.00 fee effective January 1, 1987 based on changes in the cost of living as reflected in the Consumer Price Index.

Since the jukebox compulsory license has been in place, the Copyright Office has collected the license fees for their subsequent distribution by the CRT. The Copyright Office data regarding the number of machines and dollar receipts provides some interesting comparisons. In 1978, at the $8.00 rate, the Copyright Office licensed 144,254 machines and received $1,140,160.16 in fees. In 1980 this declined to 136,941 machines and $1,076,010.19 in fees.

During the period of operation under the CRT rate adjustments, the numbers have changed. In 1982 the Copyright Office licensed at the $25.00 rate, 127,444 machines and took in $2,902,904.86. In 1983 there were 113,970 machines licensed and receipts of $2,860,953.00. In 1984 the changes are even more dramatic. The 86,532 machines licensed at the $50.00 rate generated $4,378,323.00 in receipts.

The rate, set on marketplace value, was challenged in the courts, Amusement and Music Operators Assn. v. Copyright Royalty Tribunal, 676 F. 2d 1144 (7th Cir. 1982), cert. denied 450 U.S. 912 (1981). Without reviewing in detail the proceedings in that case, it is worth noting the Court's conclusion:

> Ratemaking is an art, not a science. We believe that the Tribunal did not act either unreasonably or unlawfully by establishing a $50.00 royalty fee which would be implemented in stages and be subject to future inflationary adjustments. The necessity of avoiding disruption within the jukebox industry justified the $50.00 royalty and its phased-in implementation. On the other side of the coin, the Tribunal also recognized that a reasonable fee for 1980 might become so distorted by inflation before the next "scheduled" adjustment that the addition of an automatic inflation factor was necessary to achieve the goal of the Act to provide reasonable remuneration to copyright owners. In summary, we find no fault with the Tribunal's final rule as promulgated.

In summary Mr. Chairman, we find the logic of the CRT as affirmed in the Court's decision persuasive. Congress in passing the 1976 Copyright Act determined that in fairness and the public interest, jukebox operators should pay for their use of nondramatic musical works protected by copyright as do others who use these works. The Seventh Circuit Court of Appeals agreed that basing the amount of this payment on a careful consideration of marketplace factors as they affect both copyright users and proprietors was appropriate. The present compulsory license does just that: it sets a rate and provides for its periodic adjustment. To adopt the proposal for a one-time $50.00 fee embodied in S. 1734 would destroy the present system and replace it with one that is, in my view, out of step with copyright policy - past and present.

While we agree in principle with the position that jukebox operators should bear an obligation to make some continuing payment for the use of works protected by copyright, we are aware that there has been considerable controversy over the amount of the fee. The proprietors have agreed that the $50.00 fee is too low, and the operators have taken the position that in view of their data on jukebox revenues, the fee is too high. Based upon my reading of the CRT's decision and the Seventh Circuit Court of Appeals' opinion, I believe that the marketplace analogy was an appropriate way to approach the setting of the fee in view of the guidance in the legislative history. Should the Committee believe that factors other than the marketplace analogy should be included in the CRT's calculus, we would be happy to review any such proposal. The Administration does not support the one-time payment approach to compensating copyright owners that is an integral part of S. 1734.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions you or the Subcommittee may have.

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

AUG 2 1984

Honorable Charles McC. Mathias, Jr.
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter of July 16, 1984, in which you requested my comments on three alternative methods for the collection of jukebox royalties. At the outset, I must say that the testimony of other witnesses about the compliance rate is surprising. The Amusement and Music Operators Association in its statement admits that the rate may be no higher than 50-75%. I do not have available to me the information needed to arrive at an independent conclusion as to the actual compliance rate.

Before commenting on the alternatives, I want to first restate the positions that I put forth in the hearing on June 20, 1984. The Administration opposes in principle the one-time royalty payment and would favor as the best solution a license fee to be set by free market negotiations between the copyright owners and jukebox operators or their respective representatives. Creators should be fairly compensated fot the use of their works by those who profit from that use. Without the incentives to creativity provided by copyright, there would be no music industry as we know it, and there might well be no recordings for the jukebox operators to use. It is only fair that the operators pay their share of the incentives for creativity. I will now turn to each of the three alternatives.

(1) Including a special "performance right fee" in the price of recordings used in jukeboxes at first blush appears to be somewhat attractive; however, a more detailed analysis shows the shortcomings of the approach. While it would indirectly link the royalty to be paid to the copyright owner to the number of performances of the work (since the more a record is played the faster it wears out and must be replaced) and to the number of recordings used in a jukebox at any one time, it would be difficult, if not impossible, to enforce. In short, it would not be likely to increase compliance. Presumably, when purchasing records from a distributor, the operator would have to identify himself as a jukebox operator and pay for the records at a higher rate. If an unscrupulous operator wanted to avoid paying the fee, he could simply purchase the records at retail or through a third party not identified as an operator. In addition, there would be no incentive for the distributor to charge the higher rate as the additional fee would simply be passed on to some other entity.

(2) Imposition of a one-time royalty fee on jukeboxes even at a higher rate than the initially proposed $50.00, raises a number of issues. First, if the fee would be paid by the manufacturer, it would shift the burden of

payment from the operator who directly profits from the public performance of the copyrighted music to the jukebox manufacturer who, at best, only indirectly and remotely profits from the use of the music composer's property. It seems to me that, in the interest of fundamental fairness, the person who directly profits from the public performance of the composer's copyrighted music ought to make the payment. The second issue is the one-time fee in lieu of a continuing payment for continuing use. This Administration remains firm in its position that fundamental fairness requires a continuing payment for continuing use of the valuable and socially beneficial works protected by intellectual property rights. This will help assure the continuing incentives to creativity vital to the production of these works. Even with periodic adjustment, the one-time fee would still be out of step with actual marketplace experience.

(3) A pay-per-use system in theory would be the most equitable solution; it would reward composers in proportion to the popularity of their music and jukebox operators would only have to pay in proportion to the actual plays on their jukeboxes. However, I do not believe the proposal is feasible given the current level of jukebox technology. As other witnesses testified, present jukeboxes are not equipped with devices that record plays-per-song, and new jukeboxes would have to be equipped with this feature. It would be several years, 5 to 10 based on estimates of jukebox life, before the jukeboxes actually in service were equipped with counters. Even if the copyright owners were willing to wait that long, it seems to me that this system would be no easier to enforce and, in fact, perhaps more difficult to enforce than the present system with its annual fee.

In summary, I would like to reiterate that we believe the marketplace provides the mechanism that best balances the interests of the copyright owners, the jukebox operators, and the public. The present compulsory licensing system for jukeboxes with the periodic adjustment of rates by the Copyright Royalty Tribunal appears better than the other suggested variants of the compulsory licensing system. Other witnesses have testified that compliance rates are low. This alone does not mean that the law is unfair or inequitable. Many factors, including the economic health of the jukebox industry, contribute to the compliance rate. Perhaps the real answer lies in stiffer penalties for failure to comply, more rigorous enforcement of the existing law, or some combination of the two. We believe that, given the present Congressional determination that in this area in order to prevent possible abuse of economic power a compulsory license is necessary, the present system is clearly preferable to any of the alternatives thus far proposed.

If I can be of further assistance to you in this matter, please do not hesitate to call on me.

Sincerely,

Gerry M.

Gerald J. Mossinghoff
Commissioner of Patents and Trademarks

Senator **Mathias**. Thank you very much, Mr. Mossinghoff.

You have talked about a free market system. How could you make that work?

Mr. **Mossinghoff**. Again, Mr. Chairman, I am not an expert in copyright licensing, but I understand that in Europe, the European countries rely on arm's-length free market negotiations to establish the rates that jukebox operators pay to the copyright owners, so the first place I would start, if one were contemplating such an activity, would be to review these procedures and mechanisms. While it is philosophically and theoretically possible to do it, I think you would want to review the mechanisms that are used in Europe as at least a starting point to see how the various individual operators are represented and how the copyright owners are represented in these negotiations.

Senator **Mathias**. Presumably that would be some form of collective bargaining?

Mr. **Mossinghoff**. I would think so, something on the side of the copyright owners. Presumably the three large representatives would play a role, and on the other side some form of representation, I would think, to simplify the negotiations.

Senator **Mathias**. I know you can't make a perfect analogy between print copyright and musical copyright, but would the one-time fee be analogous to a one-time fee on a bookstore?

Mr. **Mossinghoff**. No, I don't believe so.

Senator **Mathias**. I see some heads in the crowd shaking one way and some heads shaking the other way in the crowd.

Mr. **Mossinghoff**. That means that is a very difficult question, Mr. Chairman. I don't think so. I think what we have here is a performance for profit, and it is not a matter of buying a book and thus extinguishing the copyright owner's right to further resale of the book or use of the book. It is really a performance, not otherwise carved out, as the witnesses have already testified, not covered by the 1909 act, and therefore specifically added in as a compulsory licensing provision, but I don't think the analogy can be made to the sale of a book, which would exhaust the copyright owner's rights.

Senator **Mathias**. I have no further questions.

Did you have a question, Senator?

Senator **Zorinsky**. I have no questions.

Senator **Mathias**. Thank you.

Mr. **Mossinghoff**. Thank you very much.

Senator **Mathias**. Our next witnesses will be John Dorfman and Morton David Goldberg of the Patent, Trademark and Copyright Law Section of the American Bar Association.

Gentlemen, it is a pleasure to have you here.

STATEMENTS OF JOHN C. DORFMAN AND MORTON DAVID GOLDBERG, PATENT, TRADEMARK AND COPYRIGHT LAW SECTION, AMERICAN BAR ASSOCIATION, PHILADELPHIA, PA, AND NEW YORK, NY

Mr. **Dorfman**. Thank you, Mr. Chairman, and good morning. Good morning, Senator Zorinsky.

As you have indicated, I am the chairman of the American Bar Association Section of Patent, Trademark and Copyright Law.

I appear here to show the concern of the section on a subject to which my personal knowledge extends only in generalities. Therefore, I shall introduce my distinguished colleague who has considerable expertise in the area of copyrights.

We appear here today only on behalf of the section of Patent, Trademark and Copyright Law, not on behalf of the ABA as a whole. The ABA has not taken an association position on the issue. However, by the procedure known as "blanket authority," our section was given authority to present and amplify our resolution in opposition to the principle of the bill. A copy of the letter written to Chairman Mathias on January 9, 1984, explaining the views of the section, is attached to my testimony.

Now it gives me great pleasure to introduce a distinguished former chairman of the Patent, Trademark and Copyright Law Section, Morton David Goldberg, not merely a specialist in the copyright law, but one who has distinguished himself in that area in many respects.

STATEMENT OF MORTON DAVID GOLDBERG

Mr. GOLDBERG. Mr. Chairman, I am Morton David Goldberg, and I echo Mr. Dorfman's thanks for the opportunity to appear before you and to present the views of the ABA section.

With your permission, Mr. Chairman, Mr. Dorfman and I would request that our written statements be inserted in the record of the hearing.

Senator MATHIAS. Without objection.

Mr. GOLDBERG. Thank you, sir.

In essence, we believe that the principle of the bill is contrary to the principles of copyright, contrary to the principles of intellectual property, and contrary to the principles of sound legislation. For those reason we oppose the bill.

The section believes that this bill would make bad law. It would deprive copyright owners of reasonable royalties for jukebox uses of their music and, more significantly, would destroy in this area what we see as a universally accepted economic basis of copyright, namely the royalty system of continuing payment for continuing use.

The section's concern is one of principle, Mr. Chairman. The principle of this legislation is contrary to an economic premise basic to the licensing of copyrights and basic to the licensing of patents, trademarks and other intellectual and industrial property rights. The basic premise is that creators and owners should not be denied the opportunity to secure a continuing royalty for a continuing use of their rights.

The true economic value of intellectual property used on a continuing basis cannot be arbitrarily determined in advance so as to justify any mandate that the payment for its use be only a one-time payment. To the contrary, that value depends on the continuing use, and creators and owners must not be denied their right to a royalty equally dependent on the continuing use.

This is especially true of the jukebox compulsory license, which is a blanket license to use all copyrighted music. Payment of a single sum—a buyout, if you will—on a jukebox in 1984 does not, and cannot, compensate the creator of a song which will not be written until, say, 1987, and which will be performed over that jukebox at some time in the future.

We understand that the proponents of the bill have argued that economic circumstances do not justify the compulsory license fee now in effect. We cannot comment on the validity of their claims, but we can comment on the relevance argument; and that argument is not relevant, not relevant to what we view as the principle of this legislation.

If the proponents' argument has validity, the proper question, then, is whether the amount of the annual royalty should be changed, not whether payment should be restricted to a one-time payment, as the bill would do. And if the amount of the annual royalty is to be changed, there already exists a statutory mechanism for adjusting the fee, a mechanism which the Congress carefully considered and which has been sustained in judicial review, a mechanism, Mr. Chairman, which works.

Freezing the jukebox fee for all time is patently unfair. Changing economic circumstances must inevitably make a flat-dollar fee obsolete, as shown by past inflation.

Mr. Chairman, it does not play upon words to emphasize that legislation in this area should be sound, but the principle of this bill is not sound. We submit that the error glares.

For the reasons stated, the American Bar Association Section of Patent, Trademark and Copyright Law urges that the proposed legislation be rejected.

Mr. Chairman, our section again thanks you for hearing our views. We would be happy to answer any questions you may have.

[Material submitted for the record follows:]

PREPARED STATEMENT OF JOHN C. DORFMAN

Good morning, Mr. Chairman and distinguished members of the Subcommittee on Patents, Copyrights and Trademarks. I am John C. Dorfman, the Chairman of the American Bar Association Section of Patent, Trademark and Copyright Law.

I speak for the members of the Section in thanking you for the opportunity to appear before you, and to voice our Section's views in opposition to S.1734. I appear here to show the concern of the Section on a subject to which my personal knowledge extends only generally; and therefore I shall introduce a distinguished colleague and former Chairman of our Section, Morton David Goldberg, who has considerable expertise in the area of copyrights and is prepared to discuss the subject matter in greater detail.

Mr. Goldberg and I appear here today only on behalf of the Section of Patent, Trademark and Copyright Law and not on behalf of the American Bar Association as a whole, since this matter has not been considered by the House of Delegates, and the American Bar Association has not taken an Association position on it. However, by the procedure known as "blanket authority," our Section was given authority to present and amplify the following resolution passed at the meeting of our Section during the meeting of the American Bar Association in Atlanta in 1983:

> RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes in principle legislation to modify 17 U.S.C. Sec. 116 (the jukebox compulsory license) by replacing the annual compulsory license fee paid by jukebox operators with a single, one-time fee to be paid by jukebox manufacturers.

Our Section was given such blanket authority because the subject matter of the resolution and this legislation are within an area of specific expertise of members of our Section.

I attach a copy of a letter written to Chairman Mathias on January 9, 1984, explaining the views of our Section.

Now, it gives me great pleasure to introduce a distinguished former Chairman of the Patent, Trademark and Copyright Law Section who is not merely a specialist in the area of copyright law but has distinguished himself in that area in many respects. By way of example: he made a significant contribution, in his activity in our Section and as a member of the Panel of Consultants to the Register of Copyrights, in the copyright revision effort of many years which finally resulted in the Copyright Act of 1976. He is also an Honorary Trustee and Past President of The Copyright Society of the U.S.A.

It gives me great pleasure to introduce Morton David Goldberg, who will speak for our Section.

American Bar Association

January 9, 1984

Senator Charles McC. Mathias, Jr.
United States Senate
Washington, D.C. 20510

Re: S. 1734

Dear Senator Mathias:

I am writing in my capacity as Chairman of the American Bar Association Section of Patent, Trademark and Copyright Law, to express the Section's opposition to S. 1734, and ask for an opportunity to testify at any hearings on the bill. These views are being presented only on behalf of the Section of Patent, Trademark and Copyright Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and should not be construed as representing the position of the ABA.

As you know, this bill, introduced at the behest of the jukebox operators, would amend the Copyright Act and radically change the present jukebox compulsory license. At the ABA's 1983 Annual Meeting, our Section unanimously adopted the following resolution opposing such legislation:

> Resolved, that the Section of Patent, Trademark and Copyright Law opposes in principle legislation to modify 17 U.S.C. Sec. 116 (the jukebox compulsory license) by replacing the annual compulsory license fee paid by jukebox operators with a single, one-time fee to be paid by jukebox manufacturers.

To summarize the Section's views, the Section believes that S. 1734 would make bad law: In place of the current law's annual compulsory license fee of $50 per box (starting in 1984) -- a fee determined as reasonable after public hearings and upheld by the courts -- H.R. 3858 would substitute a one-time $50 per machine fee. In so doing, it would deprive copyright owners of reasonable royalties for jukebox uses of their music and, more significantly, would destroy the universally-accepted economic basis of copyright, the royalty system of continuing payment for continuing use.

In more detail, the Section's views are as follows: Under the 1909 Copyright Act, most public performances of copyrighted musical compositions by means of jukeboxes were exempt from liability. This anomalous provision was long thought to be unfair. When Congress undertook revision of the old law, it concluded that no justification for continued exemption existed. However, rather than allow the free marketplace to determine proper license fees for this use of copyrighted property, Congress, at the urging of the jukebox operators, enacted a compulsory license, which became part of the 1976 Copyright Act. 17 U.S.C. §116.

The compulsory license requires that jukebox operators pay a reasonable, annual license fee, for their continuing use of copyrighted music. The statute initially set that fee at $8 per jukebox; Congress, however, expressly stated that the $8 annual fee was unrelated to any economic data, and that a higher fee would be justified. Congress delegated the responsibility for determination of a reasonable fee to the Copyright Royalty Tribunal. The Tribunal was to adjust the fee in 1980, and every 10 years thereafter as changing economic conditions warranted. The jukebox operators tried, and failed, to have the revision bill amended in the Senate to freeze the $8 fee for all time.

The Copyright Royalty Tribunal held hearings in 1980 at which "voluminous" evidence was presented by jukebox operators and copyright owners. The Tribunal concluded that a reasonable per box annual fee would be $50, but phased in that fee so that it would not take effect until 1984. The jukebox operators appealed the Tribunals's decision to the Seventh Circuit, which found it "lawful in all respects." *Amusement and Music Operators Association v. Copyright Royalty Tribunal*, 676 F. 2d 1144 (7th Cir.), *cert. denied*, ____ U.S. ____, 51 U.S.L.W. 3287 (1982).

The jukebox operators have now proposed legislation to modify the compulsory license, which has been introduced in the Senate, S. 1734, 98th Cong., 1st Sess. (Zorinsky). A corresponding bill has been introduced in the House, H.R. 3858, 98th Cong., 1st Sess. (Breaux). The proposed legislation would modify the compulsory license in many crucial ways:

1. The $50 annual fee would become a one-time $50 fee.
2. The fee would be frozen for all time.
3. The fee would be paid by jukebox manufacturers, rather than jukebox operators.
4. There would be no requirement (as there is under current law) that a certificate of compliance be affixed to a licensed jukebox.
5. There would be general amnesty for jukebox operators who failed to comply with the law prior to the bill's enactment.
6. Many details of the compulsory license's procedures would be changed.

The Section of Patent, Trademark and Copyright Law believes the proposed legislation should be rejected. The universally-accepted economic basis of both the copyright and patent systems is payment of a continuing royalty for continuing use of intellectual property. A one-time fee -- a "buy-out" -- cannot adequately compensate creators and copyright owners. Indeed, those copyright owners whose works were created and performed over a jukebox after that jukebox's one-time fee was paid would never be compensated for those uses of their property.

A single $50 per jukebox payment would also shortchange creators and copyright owners. The Copyright Royalty Tribunal concluded, based on a "voluminous" record, that a $50 *annual* fee was reasonable. Jukeboxes have an average usable life of 5 to 15 years. The one-time fee proposed would therefore result in drastically less compensation for copyright owners than that found reasonable by the Tribunal and also unfair and unrealistic. Changing economic circumstances would make a flat dollar fee obsolete, as shown by the inflation of the past decade.

The proposed legislation would also make enforcement of copyright owners' rights most difficult, if not impossible. And, for past infringements, the amnesty it proposes would negate owners' rights completely.

I understand that your subcommittee does not have any hearings scheduled on S. 1734. Should such hearings be scheduled, the Section would appreciate the opportunity to present its views through the oral testimony of its representatives.

With best wishes,

Sincerely,

John C Dorfman

John C. Dorfman

PREPARED STATEMENT OF MORTON DAVID GOLDBERG

Mr. Chairman and members of the Subcommittee, I am Morton David Goldberg, and I echo Mr. Dorfman's thanks for the opportunity to appear before you and present the views of the American Bar Association Section of Patent, Trademark and Copyright Law on S.1734.

With your permission, Mr. Chairman, Mr. Dorfman and I would request that our written statements be inserted in the record of the hearing.

In essence, we believe the principle of the bill is contrary to the principles of copyright, contrary to the principles of intellectual property and contrary to the principles of sound legislation. We therefore oppose the bill.

On August 1, 1983, the very same day as the legislative day when S.1734 was formally introduced, the Section of Patent, Trademark and Copyright Law, by unanimous voice vote, adopted its resolution on this matter at the Annual Meeting of the American Bar Association in Atlanta:

> RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes in principle legislation to modify 17 U.S.C. Sec. 116 (the jukebox compulsory license) by replacing the annual compulsory license fee paid by jukebox operators with a single, one-time fee to be paid by jukebox manufacturers.

(Resolution 306-3, 1983 Summary of Proceedings, Section of Patent, Trademark and Copyright Law, American Bar Association, pp. 18, 23, 67-68)

The Section believes that S.1734 would make bad law: in place of the current law's compulsory license fee, paid each year for each jukebox, in the amount of $50 (starting in 1984) -- a fee determined as reasonable by the Copyright Royalty Tribunal after public hearings and upheld by the courts -- S.1734 would substitute a one-time fee of $50 per machine. In so doing, it would deprive copyright owners of reasonable royalties for jukebox uses of their music and, more significantly, would destroy in this area the universally-accepted economic basis of copyright, the royalty system of continuing payment for continuing use.

The Section's concern is one of principle. The principle of this legislation is contrary to an economic premise basic to the licensing of copyrights and basic to the licensing of patents, trademarks and other intellectual and industrial property rights: the basic premise that creators and owners should not be denied the opportunity to secure a continuing royalty for a continuing use of their rights.

The true economic value of intellectual property used on a continuing basis cannot be arbitrarily determined in advance so as to justify any mandate that the payment for its use be only a one-time payment. To the contrary, that value depends on the continuing use; and creators and owners must not be denied their right to a royalty equally dependent on the continuing use.

This is especially true of the jukebox compulsory license, which is a blanket license to use all copyrighted music. Payment of a single sum -- a "buy-out" -- on a jukebox in 1984 does not, and cannot, compensate the creator of a song which will not be written until, say 1987, and which will be performed over that jukebox at some time in the future.

We understand that the proponents of the bill have argued that economic circumstances do not justify the compulsory license fee now in effect. We cannot comment on the validity of their claims, but the argument is not relevant to what we view as the principle of this legislation.

If the proponent's argument has validity, the proper question is whether the amount of the annual royalty should be changed, not whether payment should be restricted to a one-time payment (as would be done under S.1734). And if the amount of the annual royalty is to be changed, there already exists a statutory mechanism for adjusting the fee, a mechanism which Congress carefully considered and which has been sustained in judicial review. The mechanism works.

It would be a waste of the valuable time of Congress for it to engage in periodic rate-making and review that is best delegated, as Congress has done under the existing statute. If, ultimately, the proponents of the bill are dissatisfied with the compulsory license, the best solution would be to do away with the compulsory license completely, and to let the job be done by the free marketplace, which will take into account the many relevant economic factors.

Under the Copyright Act of 1909, most public performances of copyrighted musical compositions by jukeboxes were exempt from liability, an anomaly which was long recognized as unfair. When Congress undertook revision of the old law, it concluded that there was no justification for continuing the exemption. S.Rep. No. 94-473, 94th Cong., 1st Sess., 96 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 113 (1976).

However, at the urging of the jukebox operators, Congress enacted a compulsory license as part of the 1976 Copyright Act, rather than allowing the free marketplace to determine proper license fees for this use of copyrighted property. 17 U.C.S. §116.

The compulsory license requires that jukebox operators pay a reasonable annual license fee for their continuing use of copyrighted music. Although the statute initially set that fee at $8 per jukebox, Congress expressly stated that the $8 annual fee was adopted without any adequate analysis of economic data, and that a higher fee would be justified. S.Rep., 99; H.R. Rep., 115. Congress delegated the responsibility for determination of a reasonable fee to the Copyright Royalty Tribunal, which was to adjust the fee in 1980, and every 10 years thereafter, as changing economic conditions warranted. 17 U.S.C. §801(b)(1), 804(a). The jukebox operators tried, and failed, to have the bill which became the 1976 Copyright Act amended in the Senate to freeze the $8 fee for all time; the vote against their amendment, however was 60-30. Cong. Rec. S2030-2034 (daily ed. February 19, 1976).

The Copyright Royalty Tribunal held hearings in 1980 at which voluminous evidence was presented by jukebox operators and copyright owners. The Tribunal concluded that a reasonable annual fee per jukebox would be $50, but phased in that fee so that it would not take full effect until 1984. 46 Fed. Reg. 884 (1981).

The jukebox operators appealed the Tribunal's decision to the Court of Appeals for the Seventh Circuit, which found it "lawful in all respects." Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir.), cert. denied, 459 U.S. 907 (1982).

The jukebox operators now urge passage of S.1734 (Zorinsky) (and the corresponding bill in the House, H.R. 3858 (Breaux)) to modify the compulsory license. The proposed legislation would modify the compulsory license in crucial ways:

1. The $50 annual fee would become a one-time $50 fee.

2. The fee would be frozen for all time.

3. The fee would be paid by jukebox manufacturers, rather than jukebox operators.

4. There would be no requirement (as there is under current law) that a certificate of compliance be affixed to a licensed jukebox.

5. There would be a general amnesty for jukebox operators who failed to comply with the law prior to the bill's enactment.

6. Many details of the compulsory license's procedures would be changed.

As stated, a single payment of $50 per jukebox would shortchange creators and copyright owners, as evidenced by the conclusion of the Copyright Royalty Tribunal that a $50 annual fee was reasonable. If, as we understand, jukeboxes have an average usable life of 5 to 15 years, the one-time fee proposed would result in drastically less compensation for copyright owners than that found reasonable by the Tribunal and upheld by the courts.

Freezing the jukebox fee for all time is also patently unfair. Changing economic circumstances must inevitably make a flat-dollar fee obsolete, as shown by past inflation. The proposed legislation would also make enforcement of copyright owners' rights more difficult, if not impossible; and for past infringements the amnesty it proposes would negate owners' rights completely.

The principle of the bill is not sound. The error glares.

For the reasons stated, The American Bar Association Section of Patent, Trademark and Copyright Law urges that the proposed legislation be rejected.

Mr. Chairman, our Section again thanks you for hearing our views. I would be happy to answer any questions.

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July 31, 1984

Hon. Charles McC. Mathias, Jr.
Chairman
Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 1734 (jukebox bill) --
Hearing on 6/20/84

Dear Mr. Chairman:

I write in response to your letter of July 16 and your question on the page enclosed, in connection with the testimony which Mr. Dorfman and I presented before the Subcommittee on June 20 on behalf of the Section of Patent, Trademark and Copyright Law of the American Bar Association.

As we indicated at that time, the position of the Section on the subject matter of the hearing is that creators and owners of copyrighted works should not be denied the opportunity to secure a continuing royalty for the continuing use of their rights. Inasmuch as S. 1734 would deny such an opportunity, the Section strenuously opposes the bill.

In the question you now pose, you have requested our comments on "the practicability and the fairness" of "suggested alternative methods of collecting jukebox royalties...."

Unfortunately, an appraisal of the practicability and fairness of the proposals would require an evaluation of economic factors and other matters relating to the industry, which are not within the scope of our Section's position on the matter of basic principle alluded to above. For that reason, we unfortunately are not able to provide further comments on these specific proposals.

However, if there are other matters relating to the bill as to which you believe we may be of assistance, please let us know.

Again, we thank you for the opportunity to appear before the Subcommittee to present our testimony.

Respectfully,

Morton David Goldberg

Morton David Goldberg

Senator MATHIAS. Mr. Goldberg, you have indicated that you oppose the concept of a one-time jukebox fee.

Mr. GOLDBERG. Yes, sir.

Senator MATHIAS. As Senator Zorinsky suggested, it is clearly easier to collect a one-time fee at the end of the assembly line. Of course, we need to look not only at the ease of collection but also at the equity of the system. But what would you think about a system of one-time payments that could be adjusted from time to time?

Mr. GOLDBERG. First, as you say, Mr. Chairman, ease is not equity. Second, the adjustment from time to time of a one-time fee, such as the bill proposes, cannot be prospective so as to compensate in 1984 for work which is going to be played on that jukebox which is not written until 1987 and, of course, played at a later time.

And, indeed, as we have indicated and, as you know, Mr. Chairman, a mechanism does exist under the present system for adjustment of fees through the Copyright Royalty Tribunal.

Senator MATHIAS. What about the suggestion that Mr. Mossinghoff made with respect to a free market approach? Does the concept of a collective-bargaining arrangement appeal to you as one who has had some practical experience in the field?

Mr. GOLDBERG. Yes, Mr. Chairman, it does. Indeed, if the compulsory license is onerous, is objectionable, to the jukebox owners, we would heartily recommend the operation of the free market approach under which the payments would be negotiated between representatives of the copyright proprietors and the representatives of the jukebox owners.

Senator MATHIAS. But you would continue to have a system of annual payments?

Mr. GOLDBERG. We would leave it in the free market to whatever terms and conditions, whatever amounts, the parties freely negotiate between them. The overwhelming likelihood, Mr. Chairman, is that there would not be a one-time payment for all time on a given box, because of the inequity of it and the arbitrariness of it, as we have indicated in our prepared statement.

Senator MATHIAS. Mr. Dorfman, would you like to comment on this idea of a free market approach?

Mr. DORFMAN. I am sorry. I echo Mr. Goldberg's remarks about that. I think the free market approach is fine. It will be a particularly expensive way.

I think it is particularly fine for lawyers, and I can say——

Senator MATHIAS. I almost hesitated to ask you that question as practicing members of the bar, because this is such a lure.

Mr. DORFMAN. It is really less practical than the present system, but a free market——

Senator MATHIAS. How would you ever get them under one roof? What would you have to do to get that?

Mr. DORFMAN. There would have to be a lot of adjustment. It is like anything that works on a free market basis. There is a lot of trial and error that goes into it, and it eventually shakes down into a system that can be handled, and probably numbers that can be handled, but there could be a lot of effort put into it before that time were reached.

Senator MATHIAS. It would be like trying to get an agreement among all the heirs of an estate of a wealthy intestate distant relative—trying to get a final release from all the scattered heirs.

Mr. GOLDBERG. Mr. Chairman, in that connection I think it is important to note that it is in the interest of the copyright proprietors, of the composers and the music publishers to have an effective licensing system. I do not think that it would be in their interest to stand off from any negotiations which might otherwise be undertaken with the jukebox operators in a free marketplace.

Senator MATHIAS. So you think they would be drawn to the forum, whatever that forum might be?

Mr. GOLDBERG. Whatever that forum might be. It is in the mutual interest of the owners and the users in the area of copyright, as indeed in other areas of proprietary rights, that there be a licensing arrangement, that there be the broadest possible uses, and that there be payment for those uses.

Senator MATHIAS. Do you really think, Mr. Goldberg, that that is a practical possibility?

Mr. GOLDBERG. Yes, sir. Yes, indeed.

Senator MATHIAS. Let me ask you, both you and Mr. Dorfman, to make a guess. Suppose you went into that kind of a system. Would the fees be higher, or lower, than those set by the tribunal?

Mr. GOLDBERG. To the extent that——

Senator MATHIAS. That is a pure guess.

Mr. GOLDBERG. It will be a pure guess because I am neither an economist, nor one prepared today with any of the background on the economic statistics and the economic controversies between the parties.

However, looking at it simplistically, in a free market economy I should think that the rates would approximate those found by the Copyright Royalty Tribunal and upheld by the Seventh Circuit Court of Appeals when the CRT tried to approximate as closely as possible what the marketplace would determine, based on the criteria in chapter 8 of the Copyright Act of 1976.

Senator MATHIAS. Mr. Dorfman, what do you think?

Mr. DORFMAN. I think that is true. I think the Copyright Royalty Tribunal is doing its very best to simulate what would happen in the free market situation. One never knows what will happen in the free market situation. It could be chaotic initially, but I think that the Copyright Royalty Tribunal does what it can to model the free marketplace.

It tries to find out what the various causes and effects might be, and to do the fairest thing under the circumstances and I suspect, as Mr. Goldberg said, the outcome might be very little different from the way it is today.

Senator MATHIAS. Well, it would be an awesome scene. I can imagine the battalions of copyright lawyers on both sides, marching into the fray. I would suggest that the record industry might contribute a record of Tchaikovsky's 1812 Overture, and then the two sides could meet just when the cannons boom. [Laughter.]

Thank you very much, gentlemen.

Senator Zorinsky, do you have questions?

Senator ZORINSKY. Thank you, Mr. Chairman.

Mr. Goldberg.

Mr. **Goldberg**. Yes, sir.

Senator **Zorinsky**. I have heard—you come here on behalf of the American Bar Association?

Mr. **Goldberg**. We come here on behalf of the section of Patent, Trademark and Copyright Law of the American Bar Association.

Senator **Zorinsky**. How do you get a consensus to represent that area? Is there a resolution introduced?

Mr. **Goldberg**. There is a resolution. That resolution is in the record. That resolution was transmitted to the subcommittee in January. That resolution was published in the summary of proceedings of our section, and distributed, I believe, some time in December. That resolution was arrived at at an open meeting of the section last year.

Senator **Zorinsky**. Do you know who wrote the resolution?

Mr. **Goldberg**. I do not, sir.

Senator **Zorinsky**. Does anybody in your section know who wrote the resolution?

Mr. **Goldberg**. I am sure.

Mr. **Dorfman**. Senator, our resolutions are written by committee. That is, our structure is a committee structure. I wouldn't say like the Senate's, but it is——

Senator **Zorinsky**. I am told by members of the subcommittee that an individual by the name of Fred Koenigsberg—are you familiar with that name?

Mr. **Goldberg**. He is employed by ASCAP. However, he is only one of the members of the section. He is only one of the members of the committee which worked on this.

There are other members of the section who, for example, represent the jukebox owners.

Senator **Zorinsky**. I am told he played a signficant role in introducing it.

Mr. **Goldberg**. The record of our summary of proceedings indicates that he participated in the debate, the debate which resulted in a unanimous voice vote in support of the resolution.

Senator **Zorinsky**. Do you think as an employee of ASCAP he had a pecuniary interest in that resolution?

Mr. **Goldberg**. I don't think that he did directly. I think that it is correct that the interests of his organization are reflected in that resolution, but the interests of the organizations or the clients of any member of the 6,000-plus member section are reflected or can be reflected in any of the resolutions.

Indeed, there are attorneys, as the Senator, I am sure, knows, who represent the jukebox operators who are also members of our section, and who are also privileged to attend the open meeting to debate the resolutions.

Indeed, there were two persons who did debate the resolution, who opposed the resolution and made arguments in opposition to it, and those were considered by the section.

Senator **Zorinsky**. Can you name which ones those were?

Mr. **Goldberg**. Yes, sir. The summary of proceedings on page 68 indicates Mr. Gary J. Shapiro opposed the resolution and that Mr. Robert Schwartz opposed the resolution.

Senator **Zorinsky**. Did anybody in your section contact the individuals to get their views on this resolution?

Mr. GOLDBERG. As I have told Mr. Schuckman, the attorney for the jukebox operators, when he telephoned me approximately 1 week ago, I am not aware that the section conducted any investigation to obtain additional views. It is not the custom, and it is not the pattern of the operation of the association or indeed of any bar association that I am aware of, to conduct investigations in matters of this sort.

These are open meetings. Mr. Schuckman and other members of his firm representing the jukebox operators are members of the section. Notice was given of the meetings of the section, and all are invited to attend.

Senator ZORINSKY. Thus far, I have heard you indicate with relationship to the Copyright Act the correctness of what has happened thus far. I have yet to hear anybody testify, and in introducing a resolution I would think you do because the American Bar Association certainly has attorneys throughout the country who also derive retainer fees from people who make a livelihood in the very business that I am indicating is having trouble existing, and that is in the jukebox industry. They use lawyers, too.

Mr. GOLDBERG. And some of them are members of the section of patent, trademark and copyright law, that is correct, Senator.

Senator ZORINSKY. The question I am asking you is, do you know, for instance, as a spokesman for that section, what a diamond needle replacement in a jukebox costs?

Mr. GOLDBERG. No, sir, but there are many members of our section who may be unaware of the specific details of the industries with which legislation is concerned, and——

Senator ZORINSKY. Well, what would happen if there were no jukeboxes to play the records? Who would you go get the $50 from? I mean, despite all the legal mumbo-jumbo that you say is so correct in the law books, where would you go get the royalty fee if there was no jukebox industry to play the jukebox records?

Mr. GOLDBERG. Well, if——

Senator ZORINSKY. The point I am trying to make is that you should have some understanding of what is providing the revenue to the tribunal as much as you do for what is going to receive the remuneration for the efforts expended in writing the song that they are using, also.

For instance, do you know what a mechanic costs, to take someone to take a bent quarter out of a jukebox?

Mr. GOLDBERG. No, Senator, I do not. As I indicated in my statement, our resolution is addressed to the principle of the bill. There are many economic factors, as you know far better than I, and as others who will testify later this morning know far better than I.

There are many economic factors relating to this. Our testimony is devoted solely to the matter of the principle of the one-time payment for the exercise of a copyright right which is a continuing exercise.

Senator ZORINSKY. What if that were transferred to an ongoing mechanical payment per record. Every time a jukebox operator—would your feelings still be the same?

Mr. GOLDBERG. Would you repeat the question, Senator? I am not sure I understand it.

Senator **Zorinsky**. Say you put an extra nickel or a dime or whatever, equalized in some negotiated manner, on every record that was pressed. You know, an operator has to buy a record to put it on the jukebox to play it.

Mr. **Goldberg**. Yes, sir.

Senator **Zorinsky**. All right. If that were transferred to the record manufacturer who would pass it on to the jukebox operator at the purchase point of the record, then you would do away with all this other stuff. Now, it is an ongoing process.

Mr. **Goldberg**. If I understand the Senator correctly, there is no determination as to the amount of the continuing use which is to be made of that record. If that is the case, we would oppose such a system.

Senator **Zorinsky**. If it was added on specifically? I think you will find that the 45-revolution-per-minute record industry has dwindled proportionately with the jukebox industry.

Mr. **Goldberg**. As I say, Senator, our resolution is devoted solely to the principle of continuing payment for continuing use, and the economic factors——

Senator **Zorinsky**. Well, look. The phonograph can't play it unless the record is there to play.

Mr. **Goldberg**. That is correct, sir, but the manner in which the payment is made for the play, as you describe it, would not be a manner which would be consistent with the principle of continuing payment for continuing use.

Senator **Zorinsky**. What about if the record is in storage in the phonograph and has not been played in a month? Do you go to the composer and get his money back from him?

Mr. **Goldberg**. If it is not played, and the system in effect is one which determines the amount of payment based on the amount of play, then to that extent there would not be payment for performance of the composition that is embodied on the sound recording, which is embodied on that phonorecord.

Senator **Zorinsky**. Mr. Goldberg, this shows me your gross misunderstanding in the use of a record on a jukebox. Some of them we buy to put on the jukebox and that never get played, as opposed to some that get played like 80 percent of the time for 2 weeks, and then there are play meters in each of the machines, also.

Mr. **Goldberg**. I am told that that is true, Senator, and as I understand it the factors that you are describing were introduced in testimony before the Copyright Royalty Tribunal and were taken into account in the determination made by the CRT and upheld by the court of appeals.

Senator **Mathias**. Of course, Mr. Goldberg, this colloquy really, it seems to me, supports your thesis that a free market system might be the best answer. All of these factors would become the subjects of market negotiations, as is the price of a diamond needle.

Mr. **Goldberg**. Precisely.

Senator **Mathias**. And as is the fee for the mechanic.

Mr. **Goldberg**. There are many economic factors, Mr. Chairman. You are correct. And most of them, as Senator Zorinsky has indicated, I am not aware of and certainly I cannot assess, but it is not the position of the section to venture such an assessment.

Senator MATHIAS. The Senate has just gone into session, and we do not have permission to meet. However, we will continue and try to get our two panels, if Senator Zorinsky has no further questions.

Senator ZORINSKY. I just have one other question.

Mr. Goldberg, you do oppose S. 1734, obviously, in principle.

Mr. GOLDBERG. Yes, Senator.

Senator ZORINSKY. As you have stated, I want to ask you: Do you believe that the small businessman in the jukebox industry should be forced out of business to support the principle?

Mr. GOLDBERG. As you state it, I must answer that I have neither started, or stopped, beating my wife, Senator. [Laughter.]

I certainly do not support forcing small businessmen out of business. I think that the principle that we have indicated here is an important principle.

Senator ZORINSKY. Thank you.

Mr. GOLDBERG. Yes, sir.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Dorfman. Thank you, Mr. Goldberg.

Our next witnesses will be a panel consisting of Wesley S. Lawson, Lawson Music Co. of Winter Haven, FL; Don Van Brackel, of Defiance, OH, and Jerry Gordon, of Whippany, NJ.

STATEMENTS OF WESLEY S. LAWSON, LAWSON MUSIC CO., INC., WINTER HAVEN, FL, FOR AMUSEMENT & MUSIC OPERATORS ASSOCIATION; DON VAN BRACKEL, OF A. VAN BRACKEL & SONS, INC., DEFIANCE, OH; AND JERRY GORDON, ROWE INTERNATIONAL, INC., WHIPPANY, NJ

Mr. LAWSON. Good morning, and thank you, Mr. Chairman.

Senator MATHIAS. Gentlemen, it is a pleasure to see you here.

Mr. LAWSON. I am Wes Lawson, of Lawson Music Co., located in Winter Haven, FL. My company is in its 50th year of operation, and I have been involved for the last 41 years. I am proud to say that my son, Manly, has chosen to continue in our family business, and I am very pleased for the opportunity to be testifying before this committee today for the Amusement & Music Operators Trade Association.

I also would like to introduce at this time the people that are accompanying me today. We have Dock Ringo, our AMOA president; Mr. Leo Droste, executive vice president; Mr. Robert Schuckman and Jonathan Howe, of Jenner & Block, our general counsel; and Dr. James Gaertner of the University of Texas in San Antonio, who is our economic consultant.

As immediate past president of AMOA and chairman of its Government Relations Committee, I am very aware of the problems facing the jukebox operators. Last year, I traveled from one end of this country to the other and met a group of operators along the way that were as diverse as the country itself. Yet, they all had one thing in common: They were struggling to stay in the jukebox business. They spoke with one voice in delivering the message that higher jukebox royalty fees were driving them out of business.

They asked how they could save their business for themselves and their children. We say the jukebox business is not what it once was. There are many other forms of newer, more glamorous entertainment that the consumer can choose instead of the jukebox. But there remains a solid core of jukebox lovers in every part of this country.

In many of our rural areas, this is the only form of low cost, readily accessible entertainment for them, and I am sad, too, of course, that we are losing our ability to provide the jukebox to the American public as this cherished part of our Nation's culture continues to decline.

Our problem is one of economics. We are faced with fewer suitable locations for jukeboxes at a time that the cost of operations are skyrocketing. We do what we can to keep costs down within reason for the items that we can somewhat control, such as gasoline, transportation, and service calls, but the one cost that has risen the most in the past is beyond our control. This, of course, is the jukebox royalty fee, which is now $50 per box per year, and will rise again each year from 1987 to 1990.

Gentlemen, this 525-percent increase in fees is at a time when the industry is struggling for survival, and is probably the straw that will break the camel's back.

Since the fee first rose from $8 to $25, over 40,000 jukeboxes have been pulled from locations, and the number of jukeboxes sold in the United States has declined by 43 percent since 1976, to less than 12,000 last year. We need your help in establishing a fee that is not so excessive, and a payment mechanism that is not so burdensome.

We believe S. 1734 is one reasonable solution to our problem. We recognize and support the position that creative artists should be paid for continued use of their works. The legislation before you is not incompatible with the beliefs, since payment under it could be considered advance payment for use.

Needless to say, we are open to any revisions of S. 1734 as long as we have a fee that allows us to stay in business. I must close by telling you that we are not obstinate or single-minded in our approach. We are willing to accept any copyright system that will allow us to stay in business. In that regard, we have met with ASCAP, BMI, and SESAC several times this past winter under Representative Robert Kastenmeier and Representative Carlos Moorhead's auspices to try to resolve this issue. So far, we have not reached a solution, but we remain hopeful that we may find a compromise agreement.

We are willing, and even eager, to find common ground with the performing rights societies, but they, too, must show their willingness to solve this issue before a compromise is possible.

Finally, no matter what the wisdom of the Copyright Tribunal's decision in 1980, in retrospect it has hurt us badly. The jukebox business is reeling in 1984, and only you can act to save this segment of the Nation's small business before it is too late. We ask for your assistance in giving us a chance to recover.

We appreciate the opportunity to testify today, and ask that our statement be included in the hearing record.

Mr. Chairman, I have had a chance to glance at the written statements submitted by the performing rights societies. We have different opinions about S. 1734, but the ASCAP statement in particular is so riddled with quotations inaccurately quoted, innuendos, falsehoods about the jukebox industry that I would request the chairman's indulgence in allowing AMOA to submit for the record written rebuttals to the assertions they have made.

Senator **Mathias**. The record will be kept open, and additional statements can be filed.

Mr. **Lawson**. I thank you very much, sir.

[Material submitted for the record follows:]

PREPARED STATEMENT OF WESLEY S. LAWSON

The Amusement and Music Operators Association ("AMOA"), located in Chicago, Illinois, is the national non-profit association of over 2,000 operators of jukeboxes and amusement games. As jukebox operators, AMOA members have been directly and adversely affected by the Copyright Royalty Tribunal's ("CRT") decision to raise the jukebox royalty fee by more than 525 percent above the figure Congress authorized to take effect in 1978. AMOA supports the principle that copyright owners should be compensated for their work, but at a level that will not drive operators out of business. The jukebox industry has been steadily declining and will not survive without Congressional intervention to grant relief from the overwhelming increase in fees. AMOA supports S. 1734 as one reasonable solution to the jukebox industry's problems.

BACKGROUND

The CRT's decision to raise the royalty fee for jukeboxes from $8 to $50, in our opinion, violated Congress's intent that certain factors be adequately considered before the fee could be increased. While we acknowledge that the CRT's decision is not the only cause of the industry's decline, it is certainly a contributing and accelerating factor. One need only review the Copyright Office's figures on jukebox registrations to conclude that the increased fees have had a devastating impact on the number of jukeboxes being operated. These figures are:

Year	Registrations
1978	145,146
1979	138,798
1980	137,845

Year	Registrations
1981	135,452
1982	125,000
1983	112,817
1984*/	84,715

The number of registrations was relatively stable through 1981 when the fee remained at $8 per jukebox. When the cost jumped over 200 percent in 1982, registrations dropped by over 20,000 in a two-year period. The effect of the full 525 percent increase, which occurred on January 1 of this year, has been devastating with nearly 30,000 more jukeboxes taken out of the marketplace. There are now less than 85,000 jukeboxes registered, over 60,000 fewer than when the law took effect. Given this trend, the number of jukeboxes registered could be *de minimis* by the end of the decade.

This dropoff in registrations represents primarily a decline in the number of jukeboxes being operated, rather than a downturn in compliance. Operators who are attempting to comply with the law are unlikely to risk copyright violations by failing to re-register their machines.

AMOA has aggressively advised its members of the requirements for complying with the copyright law and of the mechanism for securing licenses, including inviting Copyright Office personnel to its meetings. Compliance is a major problem, however. Although there are no definitive figures available on the number of jukeboxes being operated, we fear that compliance is only between 50 and 75 percent. The major reason for non-compliance, we believe, is that many operators must choose between paying the fee and making the jukebox unprofitable or pulling the machine off the market. We can understand, though we do not condone, why many operators make the former choice. Nevertheless, complying operators are placed at a distinct competitive disadvantage and creative artists are denied the income that Congress mandated they receive. It follows that a law with a built-in mechanism for higher, if not complete compliance is warranted.

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*/ As of mid-May.

THE CRT'S DECISION

Congress instructed the CRT to set royalty fees calculated to achieve certain statutory objectives.*/ Essentially, the CRT was directed to set a fair rate. Despite its efforts to do so, we believe the CRT improperly set the rates on the basis of inapposite marketplace analogies. This marketplace is so characterized by monopoly control and pricing that the American Society of Composers and Publishers ("ASCAP") must operate under a judicial consent decree. Congress recognized that this so-called free marketplace would not work for several major users of copyrighted works and responded by creating compulsory licenses, including the one for coin-operated phonorecord players.

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*/ (A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. . . .

17 U.S.C. § 801.

Moreover, in setting the rate, the CRT refused to take any evidence whatsoever on the creative artist's income and expenses even though it was impossible to set the statutorily-required fair rate without such information.*/

Although the Court of Appeals for the Seventh Circuit upheld the CRT's decision**/ and the Supreme Court denied AMOA's petition for a writ of certiorari,***/ the broad discretion granted to the CRT by Congress made such a result likely, if not inevitable.

THE ECONOMIC PROBLEM

Events subsequent to the CRT's decision demonstrate that it was incorrect. Congress directed the CRT to minimize the disruptive impact on the structure of the industries involved and on industry practices. The enormous decline in registrations since the CRT's decision compels one to conclude that the CRT's decision has had the opposite effect -- the industry has been disrupted and is staggering. Since the CRT may not review the rates again until 1990, operators must turn to Congress for help now.

There are several reasons for the decline of the jukebox industry. The majority of operators are small businessmen who are struggling against a number of factors that combine to make the jukebox business unprofitable. These factors include:

(1) increased manufacturing and service costs;

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*/ 46 Fed. Reg. 884, 887-888 (1981).

**/ 676 F.2d 1144 (7th Cir. 1982).

***/ ______ U.S. ______, 51 U.S.L.W. 3287 (1982). AMOA's brief to the Court is attached as Exhibit 1.

(2) the rising price of records;

(3) loss of suitable locations for jukeboxes due to changing patterns of social activities;

(4) widespread replacement of jukeboxes by other forms of entertainment, such as sound systems, radio, television, discos and live performances; and

(5) the inability to increase prices per play to keep pace with inflation.

A recent "Report on the Economic State of the Jukebox Industry" (Exhibit 2) prepared for AMOA by James F. Gaertner, Ph.D., CPA, formerly of the University of Notre Dame, and currently with the University of Texas at San Antonio, presents ample evidence of the economic turbulence in the industry. Conclusions of this report are:

(1) the number of jukeboxes operated is declining;

(2) the number of locations with only jukeboxes is declining;

(3) the purchase of jukeboxes as a percent of market value (as indication of asset turnover) is down to 8%;

(4) the total revenues and revenues per jukebox reported have dropped;

(5) the typical annual profit per jukebox is approximately $77 without even considering the copyright fee; and

(6) the average annual rate of return on a jukebox is only 5.2%.*/

Furthermore, a report prepared for AMOA by Coopers &

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*/ Some industry critics have contended that operators make such huge profits from video games that they deserve no relief for their jukebox businesses. Now that all evidence demonstrates the dire financial straits of the video game industry, we wonder whether these same critics will agree that jukebox operators deserve help.

Lybrand (Exhibit 3) shows that the number of jukeboxes sold in this country has declined by 43% from 1976 to 1983. Given the documented problems of the industry, the full 525+ percent fee increase is likely to destroy any chance that the industry may have to recover.

It is evident that the fees paid to copyright owners will diminish as the number of machines registered continues to decline, perhaps creating economic hardship for creative artists as well. We note, however, that ASCAP reported total receipts in 1983 of over $200 million, the highest in its history.*/ This figure included over $166 million from licensing fees. ASCAP's share of the 1983 jukebox royalty fees, therefore, accounted for less than 1% of its total 1983 income. Accordingly, logic prevents us from concluding that a diminution in jukebox royalty fees would disrupt copyright owners' creative activities.

At the risk of digressing, we would like to respond to critics of industry data. AMOA has regularly had surveys conducted by respected independent entities to provide data on the state of the industry. The results have consistently shown a decline. We have made Dr. Gaertner, author of the most recent survey, available to the Committee to answer any questions about the surveys.

Critics have not produced contrary scientific documentation. Instead, they attack jukebox operators by suggesting that they are dishonest. A recent ASCAP Briefing Book on Jukeboxes and Copyright states bluntly on page 1 that "it is well-known that [operator's] cash receipts are often not reported accurately." Well-known by whom?

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*/ See Cash Box, March 3, 1984.

The U.S. Department of Justice, through its National Institute of Justice, issued a report in January 1983 entitled "Racketeering in Legitimate Industries: Two Case Studies," which included the vending industry.[*] It concluded that:

> "Significantly, we have been unable to find any evidence, either from the public record or from the police files to which we had access, to suggest that law enforcement agencies have any significant information about either activity [-- skimming and laundering in the vending industry]. Both are obviously possible, but the analysis has not, to our knowledge, proceeded beyond the possible to deal with the actual. In other words, the assertion has been repeated without any substantial evidence to support it. p. 24 (emphasis added).

The facts as presented in Dr. Gaertner's study, in the Coopers & Lybrand report, and in the Copyright Office's figures are unrefuted by critics of this legislation and substantiate the need for reforming the jukebox royalty mechanism.

OTHER PROBLEMS WITH THE LAW

In addition to the economic burden imposed on jukebox operators, compliance with the existing law is difficult and time-consuming. Operators must file an application and pay the royalty fee each year for each jukebox to obtain the licenses. The certificate of registration, which must be affixed to each jukebox, can easily be lost or destroyed if machines are moved to different locations or if patrons vandalize the machine, thus subjecting operators to liability for infringement. In addition, operators are prohibited from transferring licenses from jukeboxes that are being retired to new, replacement machines, thereby increasing their costs.

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[*] The amusement industry was included within the scope of the report.

The present law is equally difficult to administer and to enforce. The Copyright Office, which generally is given high marks by jukebox operators, is frequently late in processing applications, leaving the operator open to infringement claims. Such claims are zealously made by the performing rights societies. Their efforts to enforce compliance often degenerate into "take-it or leave-it" propositions to small operators in remote locations, who often are unaware of the legal requirements. In many cases, payments in excess of $2,000 have been secured for a $25 or $50 violation. Such payments may represent the entire profit from a small operator's jukebox operation, hastening his departure from the industry.

For all of these reasons, the law must be changed.

MERITS OF S. 1734

We turn now to the advantages of the proposed legislation in correcting the problems detailed herein. S. 1734 offers an alternative compulsory licensing system that would resolve these problems in a fair and positive manner. The bill amends Section 116 of the Copyright Act to provide for a one-time compulsory license fee for all new jukeboxes. Under the proposal, the manufacturer or importer of jukeboxes would obtain a compulsory license for every new jukebox manufactured or imported for use in the United States. Similarly, an operator would obtain a one-time compulsory license for every jukebox owned by the operator prior to the effective date of the Act for use thereafter. The compulsory license could be obtained simply by filing an application and statement of account and paying the applicable royalty fee. Upon securing a license, the jukebox would be registered for the duration of its useful life.

The fee for new jukeboxes under the bill would be set at $50 per machine, the highest figure currently authorized by law absent the inflation adjustment. Operators of old machines would pay up to $25 per jukebox depending on the number of years of remaining useful life. Moreover, to increase collections under the bill, operators who previously failed to register their jukeboxes could do so without penalty. While this section of the bill may be somewhat controversial, we believe it is the best and perhaps only method for prompting fuller compliance with the law by operators of old machines and thereby increase revenues paid to copyright owners.

Furthermore, the role of the CRT is de-emphasized under the proposed legislation. It would continue to distribute fees to copyright owners, but would have no authority to review jukebox royalty fees.

CONCLUSION

Difficult times and serious problems call for creative solutions. S. 1734 would create a new method for reimbursing copyright owners for the use of their works. It is a novel approach, not an improper or illegal one. A similar proposal has recently been propounded by some legislators seeking a solution to the dilemma posed by the home videotaping controversy.[*] S. 1734 is in the best tradition of novel solutions to perplexing problems. Rather than condemning it for creating a new type of license fee, critics should hail it as a reasonable response to a difficult situation.

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[*] This legislation also adds a copyright royalty to each blank tape that is sold. Jukebox operators already pay a copyright fee -- the mechanical rate fee -- for each record purchased. Although this fee is not labeled as a public performance royalty, ultimately the money is paid to the same person, the copyright owner.

AMOA supports S. 1734 because it is equitable, easy to administer and easy to enforce. The legislation would help the operator by simplifying procedures and establishing fair royalty fees. Copyright owners would benefit from greater stability in the industry which would produce a steady stream of royalty fees now and in the future.

In addition, copyright owners would benefit from higher compliance with the law. No reasonable operator would purchase a new jukebox without evidence that the royalty fee had been paid. As a result, compliance for new machines would be 100% reducing the performing rights societies' costs in enforcing the law.

With a simplified procedure and fairer royalty fee, more operators would be willing and able to register their old machines. Higher compliance would help offset any decrease in royalties paid under a one-time licensing mechanism. An incentive for registration and fee payment is further provided by the exemption for operators from liability for past failures to secure licenses.

In conclusion, by reviving the jukebox industry, S. 1734 will benefit operators, manufacturers, copyright owners, record manufacturers, record distributors, and the public. A healthier industry will result in more jukeboxes being manufactured, more records sold, and more royalty and mechanical rate fee payments made to copyright owners. An increase in the number of jukeboxes likewise would result in greater exposure for copyrighted works, engendering increased record sales. The simplified registration system would make enforcement easier and substantially reduce compliance problems. Finally, the public would benefit from the continued availability of this unique and inexpensive form of entertainment.

The jukebox is an authentic, American institution that has become a cherished part of the nation's cultural fabric. The small business people who comprise AMOA membership need assistance to save the jukebox industry and are looking to this Committee for leadership in resolving the issue. AMOA strongly endorses S. 1734 as a reasonable solution and urges this Committee to give it expeditious and favorable consideration.

EXHIBIT 1

No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
Petitioner,
v.
COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Copyright Royalty Tribunal may lawfully establish a compulsory copyright license fee for coin-operated phonorecord players that is essentially a monopoly price, when Congress explicitly denied full monopoly protection for this copyright use under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*?

2. Whether the Copyright Royalty Tribunal may ignore the collective financial condition and costs of copyright owners in establishing a compulsory copyright license fee, which, under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, must afford a "fair return" to copyright owners?

3. Whether the Copyright Royalty Tribunal may lawfully provide for automatic interim adjustments to an existing compulsory copyright license fee, when the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, provides that the Tribunal may adjust fees only once every ten years?

THE PARTIES

Petitioner Amusement and Music Operators Association is a national, nonprofit trade association of operators, manufacturers, and distributors of coin-operated phonorecord players, commonly known as jukeboxes, and other coin-operated amusement devices. Petitioner is incorporated in the State of Delaware and has no parent or affiliated corporation. Respondent Copyright Royalty Tribunal is a federal administrative agency established by the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.* The other parties who participated in the proceedings below are: The American Society of Authors, Composers, and Publishers; Broadcast Music, Inc.; and SESAC, Inc.

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In the
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No.

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,

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COPYRIGHT ROYALTY TRIBUNAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Amusement and Music Operators Association petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-32a) is reported at 676 F.2d 1144. The final rule of the Copyright Royalty Tribunal (App. B, *infra*, 33a-34a) is published at 37 C.F.R. § 306 (1981). The Tribunal's explanation of the rule (App. C, *infra*, 35a-63a) is published at 46 Fed. Reg. 884 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.*, are set forth in Appendix D hereto. The Tribunal's final rule, which is published at 37 C.F.R. § 306 (1981), is set forth in Appendix B hereto.

STATEMENT OF THE CASE

Introduction

On January 5, 1981, the Copyright Royalty Tribunal published a final rule adjusting the compulsory copyright license fee for coin-operated phonorecord players, which are commonly called "jukeboxes" (App. B, *infra,* 33a-34a). Prior to 1976, when Congress enacted the Copyright Revision Act, 17 U.S.C. § 101 *et seq.*, the copyright laws generally had exempted jukebox owners from paying copyright royalties for public performances of copyrighted works on jukeboxes. *See* 17 U.S.C. § 1(e) (1976) (repealed). In 1976, however, Congress determined that jukebox owners should pay a compulsory copyright license fee of $8.00 per jukebox per year, beginning in 1978. 17 U.S.C. § 116(b)(1). Congress also directed the Copyright Royalty Tribunal, which was established under the 1976 Act (17 U.S.C. § 801(a)), to begin rulemaking proceedings in January 1980 to determine whether any adjustment to the $8.00 statutory fee was required under the criteria set forth in 17 U.S.C. § 801(b)(1). The Tribunal is authorized to undertake similar rulemaking proceedings in 1990 and at ten-year intervals thereafter. 17 U.S.C. § 804(a).

At the completion of its 1980 rulemaking proceedings, the Tribunal concluded that the statutory fee should be increased to $50.00 per jukebox per year. The Tribunal found that the new fee should be phased-in, starting at $25.00 for 1982 and 1983, and then rising to $50.00 for the years 1984 through 1986 (App. B, *infra,* 33a). The Tribunal also concluded that the $50.00 fee should be adjusted in 1987 to reflect pre-1987 changes in the Consumer Price Index (App. B, *infra,* 34a). The Tribunal thus increased the fee set by Congress by at least 525%, and perhaps more, depending upon future increases in the Consumer Price Index.

On April 16, 1982, the United States Court of Appeals for the Seventh Circuit denied review of the Tribunal's rule (App. A, *infra,* 32a). Thus, the Tribunal's construction of these provisions cannot be challenged again for at least ten years, when new adjustment proceedings may be held. 17 U.S.C. § 804(a)(2)(C).

The Parties

Petitioner Amusement and Music Operators Association ("AMOA") is a national trade association of over 2100 operators, manufacturers, and distributors of jukeboxes and other coin-operated amusement devices. Respondent Copyright Royalty Tribunal is a federal administrative agency which Congress established in 1976 "to make determinations concerning [among other things] the adjustment of reasonable copyright royalty rates." 17 U.S.C. § 801(b)(1). The American Society of Authors, Composers, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. are three music "performing rights societies"—private associations of composers and artists—who participated in the rulemaking proceedings at issue here.

Statutory Background

The Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, permits authors and composers to copyright most songs and melodies ("nondramatic musical works"), but does not invariably grant such persons an absolute right either to preclude use of their property or to exact monopoly compensation for such use. Under the Act's "compulsory licensing" scheme, such copyright owners are required to license their works to jukebox operators at a price set by statute. 17 U.S.C. § 116. In particular, the Act requires that each jukebox operator file an application for a compulsory license with the Register of Copyrights and "deposit . . . a royalty fee for the current calendar year of $8.00 for [each] phonorecord player." 17 U.S.C. § 116(b)(1). After these fees are collected by the Copyright Office, they are to be distributed in due course to copyright owners, primarily through performing rights societies. 17 U.S.C. § 116(c).

The Act also provides for the periodic review and adjustment of the compulsory license royalty fee by the Tribunal, in accordance with several specified criteria. *See* 17 U.S.C. § 801(b)(1)(A)-(D). Thus, the Tribunal was required in 1980 to commence rulemaking proceedings to determine whether continued compliance with the statutory criteria required any adjustment in the compulsory copyright license fee for jukeboxes. 17 U.S.C. § 804(a). The Act further provides that subsequent adjustment proceedings may be held, upon petition by any person having a "significant interest" in the outcome, "in 1990 and in each subsequent tenth calendar year" thereafter. 17 U.S.C. § 804(a)(2).

Tribunal Proceedings

Pursuant to its statutory mandate, the Tribunal published a notice of rulemaking in the Federal Register on January 2, 1980 (45 Fed. Reg. 62), and thereafter conducted a seven-day hearing concerning the jukebox royalty fee. *See* App. C, *infra*. 36a. AMOA, ASCAP, BMI, and SESAC participated in the hearing. App. C, *infra*, 36a. AMOA presented evidence to show that continued compliance with the statutory criteria required no adjustment of the $8.00 fee. App. C, *infra*, 42a-44a.[1] AMOA emphasized (*see* App. C, *infra*, 48a) that the Tribunal was statutorily required to ascertain whether, among other things, the license fee "afford[ed] the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions." *See* 17 U.S.C. § 801(b)(1)(B). AMOA therefore produced evidence to show the precarious financial condition of the jukebox industry, and argued that the Tribunal must also examine the costs and economic conditions of the copyright owners. In particular, AMOA contended that the Tribunal must pierce the veil of the performing rights societies, and consider the collective costs and financial condition of the ultimate copyright owners themselves. *See* App. C, *infra*. 48a.

The Tribunal rejected AMOA's view and instead found "the ASCAP/SESAC *concept* of basing the rate on marketplace analogies to be most attractive." App. C, *infra*, 52a (emphasis in original). ASCAP and SESAC had argued that Section 801(b) of the Act, 17 U.S.C. § 801(b), required the establishment of "a compulsory license fee similar to the fee which would be reached on the open marketplace if performing rights societies and jukebox operators were free to negotiate for licenses absent a compulsory license." App. C, *infra,* 37a. ASCAP and SESAC suggested that three "marketplace analogies" were sufficient to make this determination (App. C, *infra,* 37a): "(a) general establishments, such as bars, grills, restaurants and taverns using mechanical music (i.e., music provided by non-live means); (b) background music services; and (c) foreign jukebox operators." Relying only on these three "marketplace analogies," ASCAP and SESAC argued that the royalty fee should be increased from $8.00 to $70.00. App. C, *infra,* 36a.

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[1] AMOA also contended, as the Seventh Circuit noted, that "the burden of proof to justify any increase above the $8.00 fee set by Congress rested on the copyright owners" (App. A, *infra*, 5a). The court of appeals, however, approved the Tribunal's holding "that *none* of the parties had the burden of proof in the initial mandatory hearing" (App. A, *infra*, 6a; emphasis in original).

The Tribunal found these "marketplace analogies" sufficient to provide "an appropriate benchmark" for the jukebox royalty fee. App. C, *infra,* 53a. The Tribunal noted, however, "that some jukebox operators function on a narrow profit margin, and that certain jukeboxes produce modest revenues." App. C, *infra,* 53a. Thus, the Tribunal concluded (App. C, *infra,* 57a):

> On the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria, the Tribunal has adjusted the royalty rate for coin-operated phonorecord players to $50 per machine. The rate takes into account both of what is paid for music elsewhere under similar circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators.

Finally, the Tribunal rejected AMOA's contention that the Act provides no authority for making interim fee adjustments. App. C, *infra,* 46a-48a. Thus, the Tribunal set the fee at $25.00 per jukebox per year for 1982 and 1983, at $50.00 for the years 1984 through 1986, and at

$50.00, subject to an inflation adjustment, for the years 1987 through 1990. App. C, *infra,* 53a-54a.

Seventh Circuit Review Proceedings

AMOA and ASCAP each filed petitions for review in the United States Court of Appeals for the Seventh Circuit.[2] Both petitions were denied. *See* App. A, *infra,* 32a.

AMOA challenged the Tribunal's rule on several grounds, including the three grounds upon which it seeks review here.[3] First, AMOA argued that the Tribunal erred in relying upon the three so-called "marketplace analogies" as the price benchmark for jukebox royalty fees because "the allegedly 'analogous' fees in each situation were established under the protection of government-granted monopoly rights . . . rather than in a free competitive market." App. A, *infra*, 26a; *see* AMOA C.A. Br. at 40.[4] Second, AMOA asserted that the Tribunal erred in refusing, for the purpose of calculating a "fair return" to copyright owners, to accept any evidence concerning the collective costs or financial condition of copyright owners. C.A. Br. at 52. Third, AMOA contended that the Tribunal's decision to adopt an interim inflation adjustment violated the Act. *Id.* at 56.

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[2] ASCAP argued that the Tribunal's $50.00 fee was outside the "zone of reasonableness" and that the lowest reasonable fee was $70.00. *See* App. A. *infra.* 25a. ASCAP also asserted that the Tribunal erred in phasing in the new fee, claiming that the $50.00 fee, if reasonable, should have been established immediately. *See* App. A. *infra,* 22a. BMI appeared as a party-respondent, supporting the final rule against AMOA's objections, but taking no position as to ASCAP's contentions. SESAC did not appear as a party in the court of appeals.

[3] AMOA also challenged the Tribunal's findings on the grounds that: (1) the so-called "marketplace analogies" were not sufficiently comparable to jukebox copyright use (C.A. Br. at 40); (2) the Tribunal ignored extensive evidence concerning the financial plight of the jukebox industry (*id.* at 44); and (3) the Tribunal's decision improperly relied upon information contained in a letter that was not part of the administrative record (*id.* at 65). AMOA also argued that the increase was not supported by "substantial evidence," and that the performing rights societies had not carried the burden of justifying it. *Id.* at 36, 43.

The Seventh Circuit rejected each of these contentions. First, the court held (App. A, *infra*, 27a; emphasis added) that the "*arguably* analogous musical fees provided substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark." Second, the court held (App. A, *infra*, 30a) that the Tribunal properly declined to consider any evidence concerning the costs and financial conditions of copyright owners because "it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material," and also because "the inquiries sought by AMOA into the internal distribution processes of the performing rights societies are irrelevant to the purposes of the Act." Third, the court held (App. A, *infra,* 22a) that the interim inflation adjustment "merely demonstrate[s] a flexibility with which Congress intended to endow the Tribunal in making its determinations." Thus, the court of appeals found "no fault with the Tribunal's final rule as promulgated" (App. A, *infra,* 32a).

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[4] The Act provides full monopoly protection to composers and performers with respect to both: (a) "mechanically" recorded music played in establishments such as restaurants, and (b) "background" music supplied by wire, radio, or other means to business and commercial subscribers. 17 U.S.C. § 106. With respect to these uses, copyright owners have absolute discretion in licensing their works and may exact monopoly prices. The license fees paid by jukebox operators in foreign countries are also set in a monopoly context. As the Tribunal noted (App. C, *infra*, 40a): "[T]he [foreign] fees are either negotiated with industry groups or are subject to governmental approval."

REASONS FOR GRANTING THE WRIT

The Tribunal's final rule, which has increased by at least 525% the fee that Congress thought appropriate for imposition just four years ago, is inconsistent not only with the plain language and legislative history of the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, but also with numerous decisions of this and other courts. Moreover, the decision of the court below, which upheld the rule in all respects, constitutes the definitive interpretation of various provisions of the Act, which cannot be challenged anew at least until 1990, when the Tribunal may again undertake rulemaking in this area. Nonetheless, the construction of the Act and general legal principles endorsed by the court below doubtless will be cited as authority in future rulemaking proceedings under other provisions of this and other statutes.

I. The Tribunal's Establishment Of What Is Essentially A Monopoly Price For A Copyright Use With Respect To Which Congress Explicitly Denied Monopoly Protection Is Inconsistent Both With The Act And With General Legal Principles.

The Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, establishes three levels of copyright protection. First, and as a general rule, the Act provides complete monopoly protection, pursuant to which copyright owners may either preclude use of their property or exact whatever charge they can obtain for its use. 17 U.S.C. § 106. Second, when copyrighted material is used pursuant to the "fair use" provisions of the Act, copyright owners must submit to the use of their property without receiving any compensation at all. *See* 17 U.S.C. §§ 107-110. Third, under the "compulsory licensing" provisions of the Act, which are applicable to jukeboxes, copyright owners must allow others to use their works in exchange for compensation that is specifically set by statute. *See, e.g.,* 17 U.S.C. § 116. The Tribunal's final jukebox royalty rule is utterly inconsistent with this congressional scheme.

In raising the jukebox compulsory copyright license fee by at least 525%, the Tribunal relied solely upon the three so-called "marketplace analogies" suggested by the performing rights societies. *See* page 6, *supra*. In fact, however, the "marketplace analogies" that the Tribunal found conclusive are all instances of monopoly pricing. For example, the Act specifically grants absolute monopoly protection to composers and performers of "background music," who therefore may exact monopoly compensation for the use of their property. *See generally* 17 U.S.C. § 106.[5] Jukeboxes, by contrast, are one of a handful of copyright uses for which Congress specifically denied full monopoly protection and instead chose to establish a compulsory licensing scheme, which takes into account not only the needs of copyright owners, but also those of copyright users and the general public. 17 U.S.C. § 116.[6]

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[5] As previously noted (*see* page 8 n.4, *supra*), the other two analogies used by the Tribunal—"mechanical" recordings played in restaurants and jukebox license fees paid in foreign countries—are also examples of monopoly pricing.

[6] Compulsory licensing is applicable to jukeboxes and three additional copyright uses: (a) secondary transmissions by cable television systems (17 U.S.C. § 111): (b) mechanical reproduction of musical records and tapes that have been distributed to the public (17 U.S.C. § 115): and (c) use of copyrighted materials by noncommercial educational broadcasters (17 U.S.C. § 118). Congress obviously intended compulsory licensing as an intermediate level between uncompensated "fair use" and full monopoly protection.

Until 1976, when Congress established the compulsory licensing scheme for jukeboxes, jukebox owners had generally been exempt from any special requirements under the copyright laws. *See* 17 U.S.C. § 1(e) (1976) (repealed). In 1976, therefore, Congress clearly intended to improve the position of copyright owners by allowing them, for the first time, to receive some return for the use of their works by jukebox operators, but not the monopoly profits that they would receive from full copyright protection.[7] Indeed, Congress specifically directed the Tribunal to set a reasonable rate by, among other things, accommodating both the interests of copyright owners (who naturally want a monopoly price) and those of copyright users (who naturally prefer a lower price). *See* 17 U.S.C. § 801(b)(1)(A)-(D).

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[7] Commentators have repeatedly emphasized that compulsory licensing is a direct limitation on monopoly control and pricing. *See, e.g.*, Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 Bull. of Copyright Soc. 215, 261 (1977) ("Having first come to a decision that there are appropriate copyright interests . . . to be reallocated, Congress has two ways of dealing with an exception from the scheme: (1) either by altogether exempting certain uses from payment or permission, thereby concluding that no further reliance on the copyright scheme incentives is either needed or warranted: or (2) by substituting statutory for author controls of access and price (compulsory licensing), reaffirming the essential reliance on the copyright-scheme monetary incentives."); N. Boorstyn, *Copyright Law* § 5:12 at 146 (1981) ("'[C]ompulsory licensing' . . . was established to encourage the widespread mechanical, or recorded, use of music and to prevent absolute control of popular music by the copyright owners thereof.").

In this rulemaking, however, the Tribunal established the jukebox fee simply by ascertaining the monopoly price that would be charged absent compulsory licensing (which it mistakenly believed to represent a "marketplace" price). The Tribunal then slightly discounted that price to take into account the financial condition of the jukebox industry, but provided no methodological support for the final fee that it selected.[8] By setting the jukebox licensing rate at what is essentially a monopoly price, the Tribunal effectively established a monopoly price with respect to a copyright use for which Congress explicitly denied monopoly protection. Thus, the Tribunal has produced an inefficient level of copyright use--which Congress specifically sought to avoid—and has defeated the very purpose of the Tribunal's existence. *See* page 15 & n.10, *infra*. Moreover, by creating a result through administrative regulation that Congress explicitly rejected when it established the copyright regulatory scheme, the Tribunal unlawfully exceeded the powers that Congress delegated to it.[9]

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[8] The Tribunal lowered the jukebox fee from the $70.00 benchmark proposed by ASCAP and SESAC to $50.00, not because the Tribunal desired to account for the fact that $70.00 was a monopoly price, but rather because the Tribunal believed that the "analogies" were not *completely* comparable to jukebox copyright use, and also because it was concerned about possible harm to the jukebox industry. *See* App. C, *infra*, 52a-53a; *see also* page 6, *supra*. In other words, the Tribunal was concerned not that $70.00 was a monopoly price, but that $70.00 was not necessarily the monopoly price which the marketplace would set for jukeboxes in the absence of compulsory licensing. Inasmuch as the Tribunal issued no contemporaneous methodological explanation for the fee that it set, any new explanation would now constitute mere "*post hoc* rationalizations of the agency [which] . . . cannot serve as a sufficient predicate for agency action." *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981).

The Tribunal's complete reliance on monopoly price analogies, which the Seventh Circuit unreservedly approved, is inconsistent not only with the clear intent of the Act, but also with numerous decisions in which this Court has held that government grants of monopoly protection, particularly in the area of intellectual property, must be construed narrowly. *See, e.g., Hotchkiss* v. *Greenwood,* 52 U.S. (11 How.) 248, 267 (1851) (patent protection limited to those inventions which, in addition to being new and useful, required "more ingenuity and skill . . . than were possessed by an ordinary mechanic acquainted with the business"); *Baker* v. *Selden,* 101 U.S. 99 (1880) (copyright protection held not to extend to ideas); *White-Smith Music Publishing Co.* v. *Apollo Co.,* 209 U.S. 1 (1908) (piano rolls, "mechanical" reproductions of copyrighted musical compositions, held not to be "copies" within meaning of prior Act); *Graham* v. *John Deere Co. of Kansas City,* 383 U.S. 1, 19 (1966) (emphasizing the importance of non-obviousness for patent protection: "He who seeks to build a better mousetrap today has a long path to tread before reaching the Patent Office.").

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[9] Had Congress simply intended for jukebox owners to pay monopoly royalties, it would have enacted provisions for jukeboxes similar to those applicable to copyright use by noncommercial broadcasters, who are encouraged to negotiate license agreements with copyright owners (*see* 17 U.S.C. § 118(b)(2)). The Tribunal establishes mandatory fees for copyright use by noncommercial broadcasters only in cases where licenses have not been negotiated privately. In such cases, the Act provides (17 U.S.C. § 118(b)(3)) that "the Copyright Royalty Tribunal may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in [17 U.S.C. § 118(b)(2)]."

Moreover, the decision below conflicts with numerous decisions in which other courts of appeals have recognized that the central purpose of compulsory licensing is to prevent the deleterious effects on pricing and consumption which monopoly control typically engenders.[10] *See, e.g.*, *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975) ("Congressional intent [in establishing compulsory licensing of mechanical reproduction] was apparently twofold: to encourage future creative endeavor and to combat monopolization in the music industry"); *Norbay Music, Inc.* v. *King Records, Inc.*, 290 F.2d 617, 618 (2d Cir. 1961) (with regard to mechanical reproduction, "the distrust of monopoly was so great that the form of remedy chosen was that of the famous compulsory license"); *Todamerica Musica, Ltda.*, v. *Radio Corporation of America*, 171 F.2d 369, 371 (2d Cir. 1948) ("[T]he right of a copyright owner to protect reproduction rights was at first denied by the Supreme Court and then only granted by Congress with important restrictions as to the extent of this monopoly . . . by the addition of a provision for compulsory licenses and a maximum royalty").

The Tribunal's decision to set a compulsory license fee at an essentially monopoly price therefore violates the Act and is inconsistent with numerous decisions of this and other courts.

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[10] Indeed, Congress has specifically directed the Tribunal to set the jukebox compulsory license fee at a rate which, among other things, will "maximize the availability of creative works to the public." 17 U.S.C. § 801(b)(1)(A). The strong public policy against monopolies rests, of course, not on the mere fact that monopolies lead to higher prices, but on the fact that higher prices artificially restrict consumption of goods by the public. *See* R. Posner, *Economic Analysis of Law* 201 (2d ed. 1977).

II. The Tribunal Violated The Act And General Legal Principles By Refusing To Consider The Financial Condition Of Copyright Owners, And The Costs Incurred By Them, In Ascertaining What Would Constitute A Fair Return Under The Act.

The Act specifically provides that the Tribunal must set jukebox royalty fees at a level that will, among other things, "afford the copyright owner a fair return for his creative work." 17 U.S.C. § 801(b)(1)(B). The Act also requires that the fee reflect "the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to . . . capital investment, costs, [and] risk". 17 U.S.C. § 801(b)(1)(C).[11] As AMOA repeatedly asserted, in both the Tribunal and the court of appeals (App. C, *infra,* 48a; App. A, *infra,* 29a-30a), these determinations logically require the making of some inquiry into the costs incurred by copyright owners in connection with the production or purchase of copyrighted material. In setting the fees at issue here, however, the Tribunal eschewed consideration of any cost data whatsoever,[12] choosing instead to rely only upon "marketplace parallels" which, as we have shown (*see* pages 10-14, *supra*), are simply instances of monopoly pricing. The court of appeals approved the Tribunal's departure from its clear statutory mandate, recognizing that "the Tribunal relied on . . . general marketplace analogies not related to cost." App. A, *infra*, 8a.

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[11] The Act also requires that the fee be calculated "[t]o maximize the availability of creative works to the public" (17 U.S.C. § 801(b)(1)(A)), "[t]o afford the . . . copyright user a fair income under existing economic conditions" (*id.* at § 801(b)(1)(B)), and "[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices" (*id.* at § 801(b)(1)(D)).

[12] The Tribunal repeatedly declined (*see* App. A, *infra,* 8a, 29a; AMOA C.A. Br. at 53-54) to allow AMOA to present evidence concerning the costs incurred by copyright owners or their overall economic condition, preferring instead to consider only the so-called "marketplace analogies." Indeed, the Tribunal was so convinced

(footnote continued)

By definition, a monopoly price far exceeds cost. *See* R. Posner, *Economic Analysis of Law* 282 (2d ed. 1977) ("[J]ust as the natural monopolist may, if unregulated, charge a price well above his average costs, so too may the copyright monopolist"). By looking solely to monopoly price analogies, the Tribunal failed even to consider, let alone estimate, what amount would constitute a "fair return" to the copyright owners. Instead, the Tribunal incorrectly assumed that "analogous" monopoly prices (set in the context of full copyright protection) are conclusive

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(footnote continued)
that these "analogous" monopoly prices afforded a sufficient measure of "fair return" that it refused to consider any information concerning the distribution practices of the performing rights societies that actually receive the royalties. The court of appeals approved the Tribunal's approach (App. A, *infra*, 29a): "In the proceedings before the Tribunal, the AMOA vigorously sought to bring into issue the manner in which the performing rights organizations distributed jukebox royalties to their affiliates and members. . . . [W]e believe that the inquiries sought by AMOA . . . are irrelevant to the purposes of the Act and that the Tribunal acted properly in denying these requests."

Although Congress plainly contemplated that the performing rights societies would play a substantial role in the distribution of royalties, neither the Act nor its legislative history contains any hint that Congress intended to subsidize such enterprises at the expense of copyright users. The Act mandates that the copyright owners—not the performing rights societies—shall receive a "fair return." The Tribunal's failure to consider such evidence reduces its finding of "fair return" to a matter of pure conjecture.

as to what constitutes a "fair return" to copyright owners. The Tribunal simply disregarded its statutory mandate and the court of appeals approved that lawless act.[13]

Not only does the decision below disregard the requirements of the Act, but it also conflicts in principle with the decision of the District of Columbia Circuit in *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1 (1981). In *Recording Industry*, the court affirmed that portion of a Tribunal rule that established a new compulsory license fee for the mechanical reproduction of copyrighted works. Although the court of appeals there noted that the "setting of [such] royalty rate[s] is not a routine exercise in historical cost of service ratemaking," and that "a broader inquiry" is required to determine the "fairness" of the return to the copyright owner (662 F.2d at 8-9), the court emphasized that the Tribunal properly "analyzed the empirical evidence in relation to the statutory criteria" (*id.* at 10). Unlike the evidence here, the record evidence in *Recording Industry* included substantial empirical studies of the economic costs and well-being of copyright owners.[14]

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[13] The court of appeals' reliance (App. A, *infra*, 8a, 30a) upon this Court's decision in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), for the proposition that a "fair return" may reasonably be established without any estimate of copyright owners' costs, is misplaced. Indeed, *Permian Basin*, a complicated natural-gas rate-setting case, supports the view that costs must be carefully considered in fixing a fair return. In *Permian Basin*, this Court merely allowed those costs to be estimated by using "composite cost data intended to evidence the national costs . . . of finding and producing gas-well gas" rather than insisting upon calculation of the actual costs of discovery and production of the gas in the geographical area that was the subject of the ratemaking proceeding. 390 U.S. at 800. Far from holding that costs may be ignored—and that monopoly-set "marketplace analogies" may be substituted as the sole proxy for "fair return"—*Permian Basin* holds that costs are critical to "fair return" ratemaking, but may be estimated when accurate data is clearly difficult or impossible to obtain.

Indeed, the Tribunal's refusal in this case even to approximate a rough surrogate for the costs incurred by copyright owners conflicts with numerous decisions that have repeatedly emphasized the importance of costs in "fair return" ratemaking. *See, e.g., Permian Basin Area Rate Cases,* 390 U.S. 747, 800 (1968).[15] The Tribunal's determination, that the "fair return to copyright owners" requirement of the Act is necessarily satisfied by the award of de facto monopoly returns, without any inquiry into the collective costs or financial condition of copyright owners, is contrary both to the statute and to the case law.

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[14] Among other things, the Tribunal noted two sets of statistics which indicated that copyright owners were not receiving a fair return on their costs. *See* 662 F.2d at 11 n.25. First, the Tribunal found that royalties paid to copyright owners had fallen drastically from slightly more than those paid to recording artists in 1955, to barely one-fourth of those paid to recording artists in 1979. 46 Fed. Reg. 10485 (1981). Second, although recording artists' royalties had increased to 16.8 percent of wholesale record prices in 1974, copyright owners' royalty payments had declined from 11.2 percent of wholesale record prices in 1964 to 7.27 percent in 1974. *Id.* at 10476, 10481.

[15] *See also Interstate Commerce Commission* v. *New York, New Haven and Hartford Railroad*, 372 U.S. 744, 747 n.5 (1963) (railroad rate setting: "Fully distributed costs based on the out-of-pocket costs plus a . . . distribution of the constant costs . . . indicate the revenue necessary to a fair return on the traffic, disregarding ability to pay."); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 298 n.6 (1963) (natural gas rate setting: "The phrase 'jurisdictional cost of service' as used here means the producer's system-wide cost of service (*i.e.*, all operating expenses . . . *plus* a fair return on the rate base) for its sales of natural gas subject to the Commission's jurisdiction."); *Tenneco Oil Co.* v. *Federal Energy Regulatory Commission*, 571 F.2d 834, 840 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (natural gas rate setting:

(footnote continued)

III. The Tribunal Violated The Act And General Principles Of Administrative Law By Establishing Automatic Interim Rate Adjustments For The Periods Between Ratemaking Proceedings.

The Tribunal determined, without any statutory basis, that it was authorized to establish automatic—but not yet fully quantified—interim rate adjustments to become effective during the ten-year intervals between statutorily authorized ratemaking proceedings. *See* 17 U.S.C. § 804 (a).

Because the Act mandates not only that the Tribunal base fee adjustments upon explicit statutory criteria (17 U.S.C. § 801(b)(1)), but also that fees be re-examined only at ten-year intervals (17 U.S.C. § 804(a)), the Act plainly

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(footnote continued)

"The producers, under the Constitution as well as the Act, are, at bottom, only entitled to a fair return on their actual costs . . . ."); *Consolidated Rail Corporation v. United States*, 619 F.2d 988, 991 (3d Cir. 1980) (freight car rate setting; court holds that ICC used improper measure of cost when calculating "a fair return on the cost of owning and maintaining each type of freight car."); *Celanese Chemical Co. v. United States*, 632 F.2d 568, 571 n.4 (5th Cir. 1980), *cert. dismissed*, 453 U.S. 950 (1981) (coal transportation rate setting: "[T]he word 'costs' . . . include[s] all variable and constant costs plus a fair return on capital and an amount needed to attract additional capital.").

proscribes automatic interim fee adjustments such as those imposed here.[16] Similarly, it is beyond dispute that Congress intended that all fee increases be specially tailored to the unique conditions of the particular industries involved, not to general fluctuations in the broad-based Consumer Price Index. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 173 (1976) ("[I]t is therefore expected that any adjustment of a rate . . . shall be based on the economic conditions peculiar to the industries affected by that rate."). By definition, automatic fee adjustments are based not upon pre-adjustment review of specific industry conditions in light of specific statutory criteria, but upon mere, generalized predictions that the fee might not satisfy the statutory criteria in the future. The Act requires that adjustments be based upon findings, not predictions, that an existing fee no longer satisfies the statutory criteria.[17]

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[16] The legislative history clearly shows that Congress envisioned *periodic*, rather than *continuous*, adjustments of compulsory license fees: "Chapter 8 establishes a Copyright Royalty Commission for the purpose of *periodically* reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory licenses . . . ." H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 173 (1976) (emphasis added). Congress made clear not only that it was not concerned that a fee might be stable over long periods of time, but that it actually intended that result where appropriate (*ibid.*): "The Committee does not intend these rate changes, whether up or down, should necessarily be made as the result of such periodic review." Moreover, congressional debate on the Act was focused not on the details of the periodic adjustment of compulsory license fees, but on the question whether there should be *any* periodic review of such fees and, if so, at what intervals. *See* AMOA C.A. Br. at 61-64 (description of legislative history).

Indeed, the Tribunal itself has recognized the impropriety of interim inflation adjustments in an analogous context. In the subsection immediately following that which establishes the criteria for adjusting jukebox royalty fees, the Act provides that one of the factors which the Tribunal may take into account in adjustment proceedings for cable television compulsory license fees—which may occur only every five years—is "national monetary inflation or deflation" (17 U.S.C. § 801(b)(2)(A)). Congress has made no such explicit provision for jukebox fees. *See* 17 U.S.C. § 801(b)(1).

Despite Congress' specific expression of concern for the inflation-adjustment of cable television fees, however, the Tribunal recently rejected an industry proposal for interim inflation adjustment of such fees on the ground that the Act provides for review of these fees only once every five years. The Tribunal correctly stated that a "continuous adjustment mechanism would render this periodic review scheme meaningless" (46 Fed. Reg. 896 (1981)). Therefore, just as cable television rates (for which Congress explicitly expressed its inflation-adjustment concerns) cannot lawfully be subject to a "continuous adjustment mechanism" lest the Act's periodic review scheme be frustrated, *a fortiori* jukebox fees (for which Congress specifically expressed no such concern) cannot be subject to any interim inflation adjustment.

---

[17] The Tribunal imposed two types of interim fee adjustments: (a) a phase-in mechanism, and (b) an inflation adjustment. The Tribunal ordered that its $50.00 rate be phased-in at $25.00 for 1982 and 1983, increased to the full $50.00 for 1984 through 1986, and then adjusted for inflation for 1987 through 1990. The procedure that the Tribunal followed here is, in this respect, simply inconsistent with its statutory mandate.

The Tribunal invoked a novel principle of administrative law to justify these interim jukebox fee adjustments: that the power of an administrative agency is not limited by its organic law, but extends to whatever Congress has not explicitly prohibited it from doing. Thus, the Tribunal stated (App. C, *infra*, 48a): "We find that there is nothing in the statute or legislative history which could be construed to limit the application of annual cost of living adjustments." The Seventh Circuit approved this concept of inherent agency authority (App. A, *infra*, 22a). Although the Tribunal and the court of appeals may have believed that the Act would be more effective if it provided for interim adjustments of jukebox royalty fees, the fact of the matter is that Congress made no such provision. By effectively rewriting the statute, the Tribunal has exceeded its statutory authority.

IV. This Case Raises Important Issues Which Should Be Decided By This Court.

As we have shown (*see* pages 10-22, *supra*), the court below declined review of the Tribunal's final jukebox rule despite the fact that the rule is inconsistent with both the Copyright Revision Act and general legal principles established by the decisions of this and other courts, and also with the way in which the Tribunal has construed the statute in analogous rulemaking proceedings. Not only has the Tribunal increased by at least 525% the statutory rate that Congress thought fair only four years ago, but, because of the peculiar structure of the Act, the Seventh Circuit's decision is now the law of the land and will remain so for at least ten years. Moreover, the rationale of the decision below will doubtless be relied upon in other Tribunal rulemaking proceedings.

Likewise, the ramifications of the Seventh Circuit's decision may extend well beyond the limits of the Copyright Revision Act. Because of the government's efforts at reducing unnecessary regulation, an increasing number of industries that were once fully regulated are now subject to only partial regulation. This case well demonstrates the effect of an administrative agency's reliance on statistics and indices generated by unregulated portions of an industry as a substitute for fulfilling its statutory mandate with respect to portions of the industry that Congress has chosen to regulate. Although such statistics may sometimes be relevant, they should never be deemed conclusive. *But cf.* Separate Findings of Facts, Conclusions and Opinion of Commissioner James, App. C, *infra*, 59a (emphasis in original) ("[I]t is clear that the marketplace guidelines of other analogous music users, provide the *only* credible evidence in the record to establish a 'reasonable' fee. Negotiated fees by analogous music users, which are identical or similar, based on this record is the only indicator of true market value."). The decision below ratifies the Tribunal's neglect of its statutory duty.

Also pregnant with pernicious implication is the reasoning that an administrative agency may do whatever Congress has not explicitly prohibited it from doing. That justification for administrative action is well wide of the mark because, by definition, administrative agencies possess only those powers that specifically have been delegated to them. They are bound to carry out—not create—basic government policy. Here, Congress was capable of granting copyright owners full monopoly protection instead of compulsory licensing rights, but chose not to do so. Likewise, Congress was capable of establishing an inflation accelerator for royalty fees, but again chose not to do so. The Tribunal exceeded not only the limits of its particular statutory mandate, but also the most fundamental principles of administrative law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jonathan T. Howe
Counsel for Petitioner

Of Counsel:
Barry Sullivan
Robert A. Schuckman
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One IBM Plaza
Chicago, Illinois 60611

Dated: July 15, 1982

EXHIBIT 2

SPECIAL REPORT

AMUSEMENT & MUSIC OPERATORS ASSOCIATION • 2000 SPRING ROAD, SUITE 220 • OAK BROOK, IL 60521

A REPORT
On The Economic State of The Jukebox Industry
based on the 1983 and 1981 AMOA Cost of Doing Business Surveys

by James F. Gaertner Ph.D., CPA
September 1983

I. Introduction and Background Data

This report is designed to provide economic and statistical information concerning (1) the current and projected state of the jukebox industry in the United States, and (2) the potential economic impact of the imposition of a $50 (up from $25) fee per jukebox effective January 1, 1984. The data to be presented are derived from the 1981 and 1983 Cost of Doing Business Surveys commissioned by the Amusement and Music Operators Association (AMOA), as well as information provided by the United States Copyright Office for distribution to the industry.

Copyright royalty fees were first imposed on the jukebox industry when Congress created a compulsory license for jukeboxes to take effect in 1978. The royalty fee, which was originally set at $8 per jukebox, in effect forced jukebox operators to pay copyright owners for the use of their creations. Under the 1976 Copyright Act, Congress also created the Copyright Royalty Tribunal, and mandated that this agency periodically review the royalty fee and set rates for jukeboxes in 1980 and thereafter at ten year intervals. The Copyright Royalty Tribunal conducted ratemaking proceedings in 1980 and subsequently raised the jukebox fee from the congressionally established rate of $8 per jukebox to $25 for 1982 and 1983, $50 for 1984 through 1986, and $50 plus an inflation adjustment for 1987 through 1990. This amounted to a minimum of a 525 percent increase over the rate established by Congress four years earlier. This report, in part, is designed to project the effect on that fee imposition on individual jukebox operators and the industry as a whole.

II. AMOA Cost of Doing Business Survey Data and Projections

The Amusement and Music Operators Association (AMOA) conducted Cost of Doing Business Surveys in 1981 and 1983. The objective of the surveys was to obtain data concerning costs, revenues, profit margins, statistical trends and analysis, and other worthwhile operating information. The surveys have been conducted using appropriate control techniques, and analyzed with the proper procedures for such surveys. The results of the surveys that are pertinent to the jukebox industry follow.

A. Business Machine Composition (Tables I and II)

The 1983 and 1981 surveys both revealed that no single operator surveyed had ONLY jukeboxes. However, in the 1981 survey 4.1% of the operators reported having ONLY games, in the 1983 survey this proportion is up to 20.9%. Table I provides this breakdown.

TABLE I
NUMBER OF OPERATORS REPORTING
A GIVEN BUSINESS MACHINE COMPOSITION

	1983		1981	
	Number	Percent	Number	Percent
ONLY Jukeboxes	0	0	0	0
ONLY Amusement games (Video and other)	19	20.9%	3	4.1%
ONLY Vending (and other)	0	0	0	0
ONLY Jukeboxes and games	32	35.2%	19	26.0%
ONLY Games, vending (and other)	5	5.5%	1	1.4%
Jukeboxes, games, vending (and other)	35	38.4%	50	68.5%
		100.0%		100.0%

Dr. James F. Gaertner, Ph.D., CPA

Dr. Gaertner, Department of Accountancy, University of Notre Dame, has devoted much of his non-teaching time to comprehensive research on accounting practices in the business community and is a recognized authority and lecturer on the subject. Included in Dr. Gaertner's background is five years as Chief Financial Officer and Member of the Board of Directors of Tex Tan Welhausen, a Division of Tandy Corporation.

Academically, Dr. Gaertner has distinguished himself with the publication of monographs, articles and books and is an active seminar leader and editor.

Dr. Gaertner is Past Chairman of the Continuing Education Committee of the International Accounting Section of the American Accounting Association and the recipient of the prestigious American Accounting Association Doctoral Fellowship for 1974 and 1975. His professional affiliations include the American Accounting Association, the American Institute of Certified Public Accountants, the National Association of Accountants, the Academy of Accounting Historians, the American Institute of Decision Sciences, Beta Alpha Psi, and Beta Gamma Sigma.

In the 1983 survey the respondents were asked to indicate the number of each type of machine that they operated on December 31, 1979 through 1982. The average responses are presented in Table II.

TABLE II
MACHINES PER OPERATOR
(Average Responses)

	As of December 31							
	1982		1981		1980		1979	
	n	%	n	%	n	%	n	%
Jukeboxes	65	12.1%	79	16.7%	73	16.7%	75	18.1%
Games	354	66.2%	275	58.0%	224	51.1%	192	46.4%
Vending and Other	116	21.7%	120	25.3%	141	32.2%	147	35.5%
TOTAL	535	100.0%	474	100.0%	438	100.0%	414	100.0%

It is noteworthy that while total machines operated increased for the four year period from 414 in 1979 to 535 in 1983, jukeboxes decreased for the same period (from 75 to 65). In 1979 jukeboxes constituted 18.1% of the average operator's business machines, and that same figure for 1983 was 12.1%. The largest decrease in jukeboxes operated occurred from 1981 to 1982 with a drop of 14 (79 to 65).

B. Machine Mix at Locations (Table III)

In the 1983 survey, the typical operator reported having six (6) locations that had ONLY jukeboxes, down from nine (9) in the 1981 survey. In the most recent study, forty-six percent (46%) of those surveyed reported having zero locations with only jukeboxes, which is up from twenty-eight percent (28%) in 1981. Table III provides this data.

TABLE III
RESPONDENTS REPORTING NUMBER OF LOCATIONS WITH ONLY JUKEBOXES

Locations	Percentage	
	1983	1981
0	46%	28%
1-10	29%	29%
11-20	10%	16%
21-30	6%	8%
31-40	2%	2%
41+	7%	17%
	100%	100%
Typcial Operator	6	9

C. Jukebox Turnover (Table IV)

The typical operator spent $7,000 for jukeboxes in 1983, up slighlty from $6,000 in 1981. It is noteworthy that the typical operator surveyed reported that jukebox purchases as a percent of the market value of that asset were eight percent (8%) in 1983, down from twelve percent (12%) in 1981. This statistic is reported in Table IV.

TABLE IV
PURCHASES AS A PERCENT OF MARKET VALUES
(As indication of Asset Turnover)

	1983	1981
Jukeboxes	8%	12%
Games	54%	40%

This data appears to be an indication of a continued (and possibly accelerating) movement away from jukeboxes on the part of business in the industry.

D. Revenues (Table V)

In the most recent survey, the total revenues generated from jukebox operations for the average operator were $91, 897. This figure is down from a reported $114,425 in 1981. Similarly, revenue per jukebox for the average operator is reported to be down from $947 per jukebox in 1981 to $916 per jukebox in the most recent survey. This data is presented in Table V.

TABLE V
REPORTED JUKEBOX REVENUES
(Average Responses)

	1983	1981
Total Jukebox Revenues	$91,897	$114,425
Revenues per Jukebox	$ 916	$ 947

E. Profits (Table VI)

In both the 1983 and 1981 studies, none of the operators surveyed indicated that they handled ONLY jukeboxes. This justifies the fact that in both surveys total expenses were asked for in the survey questionnaire rather than total expenses for jukeboxes only. This, then, eliminated the problem of inconsistencies which could certainly be associated with the different methods that operators might select to allocate costs to jukeboxes. For each respondent for which information was available, the total profit per jukebox was calculated in a consistent manner as follows:

Total Reported Profit	$ XXXX
Add: Cost Applicable to **only** jukeboxes (i.e. record purchases)	+ XX
	XXXX
Multiply by proportion of jukeboxes to total machines	X X%
	XXXX
Subtract record purchases	(XX)
Total jukebox profit	XXX
Divide by number of jukeboxes	÷ XX
Profit (or loss) per jukebox	$ XXX

This method, which was first used in industry surveys by Peat, Marwick, Mitchell and Company in 1980 and then again in the 1981 AMOA survey, tends to overstate jukebox profit to the extent that:

- the time required to service a jukebox is greater than that for games, causing labor costs to be understated; and
- the number of jukeboxes per location is less than for games, causing time (labor costs) and transportation costs to be understated.

This method would tend to overstate the costs of operating jukeboxes to the extent that the parts for games are more expensive and games are serviced more frequently than jukeboxes. (The previous discussion was taken from: *Economic Survey of Jukebox Operators' Business*, by Peat, Marwick, Mitchell and Company, 1980.)

Using the method described above, the profit per jukebox was calculated and is presented in Table VI:

TABLE VI
PROFIT PER JUKEBOX

Average Profit Reported	90% Confidence Interval		Highest Reported	Lowest Reported
	Lower Limit	Upper Limit		
$130.86	$69.60	$192.12	$1,153.85	−$522.50

This average profit figure per jukebox is up from the 1981 survey amount of $72.58 per jukebox, and represents an average annual return of approximately 5.2% based on a cost of $2,500 per jukebox. It appears that operators might be becoming more selective in jukebox placement. It is important to note that, based on the cost allocation criteria utilized, over twenty-five (25%) of the operators responding were experiencing a loss from their jukebox operations.

F. Additional Fee Imposition

A simple extension of the jukebox profit data is possible assuming an imposition of an additional $25 royalty fee in 1984. That cost would directly impact upon the profitability of the jukebox segment of the business and result in a reduction in the profit per jukebox of exactly that amount. This, then, would result in projected average annual profit per jukebox in 1984 to be down to **$105.86**.

It is meaningless to attempt to predict other key variables which might impact on jukebox profitability over the next several years such as inflation, increased or decreased play, etc. However, jukebox operators are at somewhat of a disadvantage in raising prices per play to keep up with increased costs, in that their machines are equipped to take quarters and therefore they are to some extent constrained in their ability to respond quickly to inflationary pressures. Therefore, it is safe to assume that any increase in the $50 royalty fee because of an inflation adjustment would be borne largely by the operator and would decrease profit per jukebox accordingly.

III. Projected Jukebox Registrations

The United States Copyright Office provided the following information on jukebox registrations for the period 1978 through 1983:

Year	Registrations
1978	145,535
1979	138,798
1980	137,845
1981	135,452
1982	125,000
1983	103,173*

These figures tend to support the proposition that the industry is declining. An extension of this data would be an attempt to project jukebox registrations in the figure based on trends established from 1978 through 1983. Using simple regression analysis these projections are as follows:

TABLE VII
PROJECTED JUKEBOX REGISTRATIONS

Year	Registrations
1985	97,000
1986	90,000

It is noteworthy that the projections presented above for 1985 and 1986 are conservative in that they are presented under the assumption that jukebox registrations are declining at a constant rate. It is, however, obvious from the registration data presented that registrations are dropping at an accelerating rate. If this accelerating rate continues, jukebox registrations will be well below the 1985 and 1986 projections presented in Table VII. (If the accelerating drop in jukebox registrations continues through 1986, jukebox registrations at that time would be below 60,000). This will, of course, have dramatic implications on the total amount of royalty fees collected in the future.

IV. Summary and Conclusions

It appears obvious from an examination of the data that the music and amusement game industry has recently been moving away from jukeboxes (and toward videogames) as the primary source of income for operators. The most recent AMOA survey finds that the typical operator reports having six (6) locations with only jukeboxes (down from 9 in the 1981 survey), and thirty-one (31) locations with only games (up from 25 in the 1981 survey). Average total revenues and average revenues per jukebox were also down in 1983 from the 1981 survey. Almost one-half of those surveyed (46%) reported having zero locations with only jukeboxes. This is up from 28% in 1981.

Using the cost allocation criteria (first used by Peat, Marwick, Mitchell and Company, in their 1980 survey) outlined in this report, current profit per jukebox is estimated to be $130.86. An additional fee of $25 will lower that amount to $105.86. If additional fees are imposed as a result of an inflation adjustment, it is safe to assume that the operator will absorb much of that amount thereby reducing profit per jukebox even more.

On a "macro-basis", it appears that the entire jukebox industry is declining and that, if this trend continues, it is possible that there will be fewer than one-half of the jukeboxes in operation by 1988 than there were ten years earlier.

In summary, it appears from the data available that the jukebox industry is in decline; and there is evidence to support the hypothesis that an increase in the royalty fee may force some operators out of business and others to accelerate their shift in emphasis away from jukeboxes and toward video games. If this does prove to be the case, it could result in decreasing royalties to copyright owners and limited public access to this form of entertainment.

---

* Through August 1985

** It should be noted that the projections presented in Table VI are statistically significant at the .01 level (Signif F = 0.0120) and have the following coefficient of determinations.

$R^2 = 82$

Adj $R^2 = 78$

EXHIBIT 3

Coopers
&Lybrand

certified public accountants

1800 M Street NW
Washington DC 20036

telephone (202) 822-4000
twx 710-822-0140
cables Colybrand

in principal areas of the world

February 1, 1984

Robert M. Schule, Esq.
Wexler, Reynolds, Harrison & Schule, Inc.
Suite 600
1317 F Street, Northwest
Washington, D.C. 20004

Dear Bob:

We are pleased to respond to your request for a study of jukebox industry sales and employment data for the 1976-1983 period. The data you requested is contained in the attached appendix.

At your direction, we contacted representatives of ROCK-OLA Manufacturing Corporation, Lowen-America, Powe International and Southern Music Distributing Company. Each representative was very cooperative and provided us with as much specific data and additional information as possible. We were also able to acquire limited data for two companies no longer active in the jukebox industry -- Centuri, Inc. and Seaburg Sales Corporation.

Centuri manufactured a limited number of units in 1982, but finding the market "too competitive" and "not profitable enough", discontinued jukebox operations. Seaburg, once a major independent manufacturer, was acquired in 1978 by Stern Electronics. In 1982, after a combined effort to reestablish a position in the market, Stern-Seaburg also discontinued jukebox operations.

Domestic jukebox sales have fallen from 20,789 units in 1976 to 11,818 units in 1983. This represents a compound annual growth rate of -7.8 percent or a total decline of 43.2 percent over the eight year period.

Domestic employment in the jukebox industry has also dropped sharply, with current employment 60 to 65 percent below 1976 levels. This decline was caused not only by lower domestic sales of jukeboxes, but also by a decline in jukebox exports.

More specific employment data can not be provided for two reasons: 1) Because only two domestic manufacturers are currently operating, it would be relatively simple for one to determine the position of the other if annual data was provided. Our guarantee of confidentiality would, therefore, be violated. 2) Because many manufacturing facilities and employees are used to assemble more than one product, accurate data is simply not available.

The industry's general decline affects more than sales and employment. It also affects production costs, profitability and ultimately, the development of new products. Smaller production runs, required for lower sales volumes, and increased uncertainty concerning future sales, have resulted in certain manufacturers limiting their risk exposure by ordering component parts in smaller quantities. Costs per unit are subsequently higher.

While production costs are increasing, competitive and other market pressures keep manufacturers from passing the increase on to distributors. Profits are reduced and manufacturers become reluctant to invest in new product development.

We sincerely hope that the information provided is sufficient for your needs. If there is any way we can be of further service, please do not hesitate to call.

Very truly yours,

Coopers + Lybrand

Attachment

APPENDIX

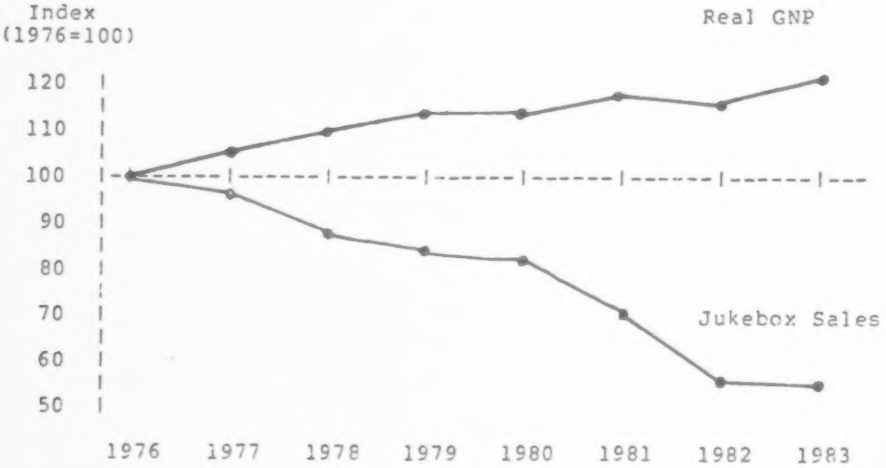
Domestic jukebox sales data are provided below as Exhibit 1. Sales information for foreign and domestic manufacturers is combined so that, as requested, the results of individual companies can not be determined.

Exhibit 1

Year	Total Sales (units)	Annual Percentage Sales Change	1976 to Date Sales Change
1976	20789	----	----
1977	20177	(2.9)	(2.9)
1978	18086	(10.4)	(13.0)
1979	17595	(2.7)	(15.4)
1980	17445	(0.9)	(16.1)
1981	14975	(14.2)	(28.0)
1982	12071	(19.4)	(41.9)
1983	11818	(2.1)	(43.2)

We have provided Exhibit 2 to graphically display the relative position of the jukebox industry vis a vis the economy as a whole. Had jukebox sales simply kept pace with growth in real GNP, 1983 sales would have been approximately 24,500 units.

Exhibit 2



AMUSEMENT AND MUSIC OPERATORS ASSOCIATION
2000 SPRING ROAD, SUITE 220 • OAK BROOK, ILLINOIS 60521 • TELEPHONE (312) 654-AMOA

The Honorable Charles Mc. Mathias
Chairman
Senate Judiciary Subcommittee on
Patents, Copyrights and Trademarks
137 SDOB
Washington, D.C. 20510

Dear Senator Mathias:

The Amusement and Music Operators Association ("AMOA") is responding for the record to the written statements of the performing rights societies (the "societies") submitted to the Subcommittee during its June 20, 1984 hearings on S.1734. Our failure to address certain points raised by the societies should not be interpreted as our agreement with or acquiescence to their positions.

1. The So-Called Free Market

Throughout their statements, the performing rights societies refer to the free market for copyrighted works. If there is such a marketplace for other copyright users, there is none for jukebox operators for two major reasons. First, most locations that have jukeboxes want music and will choose some other means of delivery, whether by radio, tape or stereo, if the jukebox is unavailable. Since the jukebox operator cannot keep music out of a location he has no leverage to negotiate license fees downward.

Operators, therefore, would be placed in an untenable position in attempting to bargain with the societies, who will be compensated by locations for their non-jukebox music, especially since the societies may be able to secure higher fees directly from location owners for non-jukebox music. This is due to the fact that locations can recover their costs by raising the price for food, drink and entertainment; the jukebox operator does not have that luxury.

Second, the operator must secure licenses from all the societies to ensure that he does not infringe the rights in any of their works. ASCAP, BMI and SESAC all own rights in different songs performed on jukeboxes making it impossible for an operator to negotiate only with one of them for the "best deal."

Moreover, it is common for copyright owners to change the assignee of public performance rights in their works, so that a SESAC song one week could be an ASCAP song the next. So, even if an operator had an "all ASCAP" jukebox one week, it could have BMI compositions the next without ever changing the records.

Finally, the operator must have all of the "hot" music on his jukebox if he is to make any profit at all. These hits are rarely, if ever, in the repertoire of only one performing rights society.

Due to the operator's lack of leverage in two essential areas -- the ability to keep music out of a location and to choose only the best-priced repertoire -- he has no free market. As Congress decided previously, the compulsory license is the appropriate means for compensating copyright owners for performances of their works on jukeboxes.

2. Economic Data

ASCAP condemned the statement in the AMOA Cost of Doing Business Survey that "any attempt to draw broad far-reaching generalizations from the findings must be done with some caution." ASCAP Statement, p. 44. AMOA is doing just that -- exercising a great deal of caution in using the 1983 Survey. The Survey is offered as one piece of evidence, which when taken together with other data concerning the jukebox industry, appears to show an industry that is in a state of decline.

It is useful to mention the other evidence which appears to reveal an industry in decline and corroborate the 1983 Survey's results:

> (1) the Coopers & Lybrand Report which reveals a significant drop in jukebox unit sales over the past several years;
>
> (2) the dramatic decline in jukebox registrations; and
>
> (3) the statements of the individual operators and manufacturers.

When all of these data are taken together, there appears to be very compelling evidence that the jukebox industry is in a state of decline. The 1983 Cost of Doing Business Survey is only one piece of that evidence, and, as such, the survey is being used as intended.

ASCAP also criticizes the response rate of the Cost of Doing Business Survey. Although the response rate was less than hoped for, this phenomenon is not unusual for surveys requesting sensitive financial data. In fact, the response rates were equal to or greater than other similar surveys.

It is noteworthy that, although the surveys are conducted in a somewhat different manner, such important events as election results are predicted based on a lower response rate from the total population than was achieved in the AMOA survey. Because of the problems associated with low response rates, election result predictions and other similar estimates are often based on a statistical technique which was also used in the AMOA surveys. This statistical technique is referred to as confidence intervals. Confidence intervals provide a method of stating how close the surveyed value of a statistic is likely to be to any measureable characteristic of the total population, and the chance of it being that close. This measure takes into account the response rate which was achieved. In the AMOA surveys, a 90% confidence interval was utilized. This guarantees that 90% of the time, the true average (mean) of the population will fall within the upper and lower boundaries of the confidence interval.

One of the factors in determining the confidence intervals is the response rate which was achieved -- the higher the response rate, the narrower are the confidence intervals' boundaries. So, although the response rate was less than hoped for, it was taken into account in determining the confidence intervals, which were presented for the key financial data.

Further, ASCAP suggests that the cover letter transmitting the AMOA questionnaire "may well have invited inaccurate responses" by alluding to possible uses of the data at "future legislative hearings." The exact quotation from the cover letter which accompanied the questionnaire to which ASCAP refers was:

> "The purpose of this survey is to obtain meaningful data concerning costs, revenues, evolving trends, and other worthwhile operating information. This information will continue to prove beneficial to the association in analyzing industry needs and strengths, as well as in such procedures as future legislative hearings."

The questionnaire sent to the respondents asked for very sensitive financial information. Typically, respondents are reluctant to provide such information; this is particularly true if they have no idea of the purpose of the request. It is akin to asking someone their income without giving any reason for the request. Consequently, in the letter which accompanied the questionnaire, AMOA included the two sentences quoted above to inform the respondent of the potential use of the data. It is noteworthy that no

AMOA legislative program was reported in the media or was even under way at this time.

This procedure of informing respondents of the potential use of the data being collected is always followed in academic studies, and is never considered to, in some way, invalidate the finding of the study. It is an extremely tenuous assumption to assume that those surveyed read the sentences alluded to by ASCAP, and responded by some form of mass dishonesty or collusion which would invalidate the entire project.

Although, without the benefit of evidence, it appears very unlikely that such mass dishonesty could have occurred, there is evidence to support the fact that such an invalidation did not occur. First, the 1983 Survey is the second such survey conducted by AMOA. The findings of the second survey follow the first survey logically, and as such, the surveys corroborate each other. In other words, there would have had to have been two cases of mass dishonesty, or the 1983 and 1981 surveys would not have been as comparable as they were.

Second, a statistical test referred to as non-respondent bias was performed on the data. The question that this test is designed to address is whether the sample obtained is representative of the population from which it was obtained. In the instance of the AMOA survey, the question might be: Did those who responded to the questionnaire do so in a way which they perceived might be of benefit to themselves (which would be different from those that did not respond)? Although no completely definitive answer can be given to this question, the non-respondent bias test can be performed to ascertain whether there were any differences between those who responded initially and those who responded only after a follow-up request for information. This test, which is always used in academic studies utilizing similar methodologies, was performed on the AMOA survey data. The results indicated no statistically significant differences in the items tested between those that did respond initially and the other group.

Accordingly, the criticism that a potential bias resulted from the statement in the cover letter as to the possible use of the data is invalid because:

(1) it seems to be very questionable that such a statement would result in the mass collusion or dishonesty necessary to invalidate the data;

(2) the second survey results follow logically from the results of the first survey, thereby further bringing into question the possibility of some type of mass dishonesty;

(3) a statistical test (non-respondent bias) was conducted on the data to determine if such a bias existed. Although no completely definitive answer can be given to this question, the tests indicated no statistically significant differences between the sets of respondents.

BMI also raises questions about the Survey. It points out that average jukebox profit is reported to have increased from $72.58 in 1980 to $130.86 in 1982. Any increase in jukebox profit is probably due to the fact that, on an average, the unprofitable jukeboxes are being removed from their locations. The survey did show that the typical operator was operating fewer jukeboxes in 1983 than two years prior. It is also important to note that the profit figures are based on a cost allocation criteria, which actually tends to overstate jukebox profits to the extent that:

(1) the time required to service a jukebox is greater than for games, causing labor costs to be understated;

(2) the number of jukeboxes per location is less than for games, causing time (labor costs) and transportation costs for jukeboxes to be understated; and

(3) several specific costs of operating jukeboxes are excluded from the computation.

So, although the BMI statement points out an increase in operator jukebox profits from 1980 to 1982, this increase is probably caused by a decrease in the number of jukeboxes operated. It is also noteworthy that the jukebox profit figure presented in the AMOA Cost of Doing Business Surveys is actually a conservative and possibly understated representation of the actual annual profit per machine.

AMOA has also presented several, completely independent pieces of evidence which indicate that the jukebox industry is in decline. One of these pieces of evidence presented was actual data from the Lawson Music Company, Inc. which is presented below.

BMI criticized this data by pointing out that the license fee is not the only expense to increase and is, therefore, not solely responsible for the decline in jukeboxes operated by Lawson Music Company. We agree that the copyright fee is not the only reason for the decline of the jukebox industry. BMI is correct that other factors are contributing to the decline. That is exactly the point AMOA is making -- even without the copyright fee imposition, the jukebox industry would be in a state of decline.

When an industry is in such a state of decline, it is the exact wrong time to impose an additional fee or tax of any kind which would have the effect of accelerating the decline. The 525+% increase in the jukebox royalty fee apparently has accelerated the jukebox industry's problems and brought them to the crisis stage.

Lawson Music Company, Inc.

JUKEBOX COST AND PROFIT ANALYSIS

Year Ending	1979	1980	1981	1982	1983	(Projected) 1984	% Increase (Decrease) 1979-1984
Total Jukeboxes	395	370	350	334	325	300	
% of 1979	100.0%	93.7%	88.6%	84.6%	82.3%	75.9%	
Weekly amt. per machine:							
Copyright Lic.	0.13	0.16	0.16	0.50	0.50	1.00	669%
Records	1.70	2.13	2.49	2.83	2.75	2.75	62%
Maintenance	6.18	6.80	6.97	7.56	9.16	9.16	48%
Fixed	2.88	2.75	3.01	3.50	4.64	4.64	61%
Depr.	2.32	3.48	3.59	3.05	3.12	3.12	34%
Profit	2.70	2.40	2.63	1.86	1.62	1.11	(59%)
Weekly Income	15.91	17.73	18.86	19.30	21.78	21.78	37%

3. Foreign License Fees

One of the frequent contentions by performing rights societies is that "jukebox operators in foreign counties pay far more than $50 annually for the right to perform copyrighted music (including American music)." ASCAP Statement, p. 6. Not only is this irrelevant to the United States, it is also wrong.

Attached to this letter are two letters from representatives of the jukebox industry in France and West Germany. Not only are the fees lower than $50 for most operators, these individuals report very similar problems in paying the fees.

In West Germany, the fee is approximately $46 annually per machine (131 DM). As Mr. H.F. Duske reports, this fee has hurt jukebox operators. In the face of decreasing revenues, the West German industry is seeking a reduction in the fee through arbitration.

In France, the fee ranges from $30 to $60 annually depending on the location. Again, the local representative reports a significant reduction in the number of machines and a widespread inability to pay the royalty fees.

In short, U.S. jukebox operators are neither out-of-step with the rest of the world, nor unique in their problem paying the steep copyright royalty fees imposed upon them. Royalty fees are not the whole problem, but in the face of reduced revenues and increased costs in all other areas, the 525 percent increase often comes as the final blow for U.S. operators.

4. Copyright Royalty Tribunal's ("CRT") Decision

The CRT was directed to set fees that, *inter alia*, would "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. . . ." 17 U.S.C. § 801(D). Whatever the wisdom of the CRT's decision in 1980, subsequent events have shown that the jukebox industry and its practices have been severely disrupted. The Coopers & Lybrand study on the decline of jukeboxes sold and the Copyright Office's figures on the fall-off of jukeboxes registered demonstrate that the industry has been disrupted. Moreover, the societies have suggested that jukebox operators change such traditional industry practices as splitting income 50/50 with locations. This recommendation is tantamount to admitting that the CRT failed in its Congressionally-mandated duty.

5. Cash Nature of the Jukebox Business

ASCAP states that "[t]he cash receipts from these businesses -- like other cash businesses which make up the underground economy -- are seldom reported accurately." ASCAP Statement, pp. 29-30. This argument advanced *ad nauseum*, sometimes directly, sometimes by innuendo, has been used for years to attempt to discredit the small business people who earn a living by operating jukeboxes. To their credit, members of Congress have seen through such attempts to portray these citizens as criminals.

To set the record straight, the U.S. Department of Justice, through its National Institute of Justice, issued a report in January 1983 entitled "Racketeering in Legitimate Industries: Two Case Studies," which included the vending and amusement industry. It concluded that:

> "Significantly, we have been unable to find any evidence, either from the public record or from the police files to which we had access, to suggest that law enforcement agencies have any significant information about either activity [-- skimming and laundering in the vending industry]. Both are obviously possible, but the analysis has not, to our knowledge, proceeded beyond the possible to deal with the actual. *In other words, the assertion has been*

> repeated without any substantial evidence to support it. p. 24 (emphasis added).

6. Mechanical Fees

ASCAP believes that jukebox operators confuse the fees paid to copyright owners for the right to record their works with the fees paid to perform these works publicly. Operators do understand the difference, but have another perspective on it. They understand that the price they pay for 45 records includes the mechanical fee. They understand that records would cost less if the recording companies did not pass the copyright fee on to the purchasers. They understand that copyright owners ultimately receive both the mechanical and the public performance fee. In short, they understand that copyright owners are compensated because operators buy records and jukebox licenses. Perhaps, these small business people do not fully grasp the nature of the esoteric rights that they are paying for, but they surely understand where the money is coming from and where it is going.

7. Enforcement of the Law

ASCAP claims that infringing operators pay "only a reasonable amount related to what they would have paid if they had complied with the law. . . . The amount of settlement asked by copyright owners has related to the amount of compulsory license fees that would have been paid by the operator for all of his or her jukeboxes, often for more than one year." ASCAP Statement, p. 65.

We should state from the outset that we do not condone violations of the law. Our purpose in responding to ASCAP's point is merely to clarify what we believe is a misstatement of the facts. Although we are not aware of all lawsuits brought by ASCAP, we understand that a claim for statutory damages is most commonly made. Statutory damages for a non-willful violation range from $250 to $10,000 per violation. Each time a record is played is considered a separate violation. The requested relief, therefore, is based on records played, not on machines registered. It is notable that the statutory penalty for only one violation is five times the annual license fee per machine.

8. Compliance

Opponents of S. 1734 claim that it would make compliance more difficult. They base their argument on the legislation's requirement that the Copyright Office make available a list of all registered jukeboxes, rather than requiring operators to place and maintain a license on each machine.

The societies' concern is misplaced. What could be simpler than having the Copyright Office furnish a list of registered jukeboxes by serial number to ASCAP, BMI and SESAC? Every jukebox has a serial number; every jukebox is on rollers. The societies' agents would merely have to request the serial number or roll the machine away from the wall several inches, look at the serial number, and check it against the numerical list. The entire process would take less than five minutes. The argument that compliance would be more difficult under S. 1734 is, as ASCAP puts it, merely a red herring.

9. Citations of Industry Spokespersons

Throughout ASCAP's statement, it quotes jukebox operators, distributors and manufacturers' statements in two publications, RePlay and Play Meter. These quotations are always taken out of context without any attempt to place them in perspective. For example, Ed Blankenbeckler, the

President of Seeburg Phonograph Corporation, is quoted liberally without any explanation by ASCAP that Mr. Blankenbeckler currently is attempting to re-establish his company as a jukebox manufacturer. Obviously, he is bullish about his prospects. Nevertheless, ASCAP failed to inform the reader that as of the date of the hearings, the new Seeburg had yet to manufacture and sell one jukebox in this country.

ASCAP also cites former AMOA President Wes Lawson's statement in 1984 that the jukebox is the backbone of the industry. As Mr. Lawson so poignantly put it after reviewing ASCAP's testimony, "it's hard to survive with a broken backbone."

Finally, we read with some humor and a certain sense of irony ASCAP's constant referrals to data from RePlay and Play Meter on operator's revenue. We particularly noted the chart on page 58 of ASCAP's Statement. The same ASCAP that went to voluminous lengths to attempt to discredit every aspect of AMOA's independent and scientifically-conducted surveys now accepts at face value survey results in the trade press without any concern for methodology, response rates or reliability. It completely boggles the mind that ASCAP could be so concerned with AMOA's University of Notre Dame studies, while citing with approval trade press reports that are based on magazine subscriber surveys. One can only conclude that ASCAP attacks a survey if its results do not serve its interests, but uses without question survey results that it believes aid its cause. Such self-serving use of numbers, or misuse of numbers, can be given no credence whatsoever.

We appreciate this opportunity to submit this response and request that it be placed in its entirety in the hearing record.

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L U F T P O S T

Amusement and Music
Operators Association

2000 Spring Road
Oak Brook, Ill. 60521
Suite 220
A M E R I K A

Dear Mr. Droste,

From Playmeter, Replay and Location I recognized, that your members fight a desperate struggle against royalty fees. I will try to give you some information of the situation in Germany and my company (about 1000 jukeboxes in operation):
The performing rights society is called GEMA (Gesellschaft für musikalische Aufführungsrechte) in Munich. They run several offices in different parts of Germany. In respect to jukebox royalty fees there exists a general contract between GEMA and ZOA (which is the German equivalent of AMOA). This contract grants several rights to members ZOA in opposition to nonmembers.

1) The yearly fee is DM 122,40 + 7% tax = DM 130,96 per jukebox, payable the half twice a year in advance.
2) Basis is a contract between GEMA and operator on every jukebox operated location. The contract is unterminable for 6 months, although it can be transferred to another location without costs. The operator is obliged to send in a monthly list of accesses, losses and trabsferred contracts.
3) The operator is obliged to pay the fees, but in most contracts with the customer he has the right, to deduct the royalty fee from the cash before splitting, so in fact the actual amount of the fee for the operator is DM 130,96 x (100-splitting)%.
4) The duration of the general contract GEMA - ZOA is in an average 3 - 4 years without raising the rate of the fee. Last increasing took place in 1980 with about 8%. This contract is cancelled by GEMA and negotiations failed with the result of a procedure before a court of arbitration (German Patent Office, Munich), in which ZOA tries to prove, that decreasing the royalty fee is necessary in respect of decreasing gross revenues since 1978 in jukeboxes.
5) As I said in number c) the effect of royalty fees in our company is on an average basis about 5,8 % of the net income of juukeboxes after tax and split before depriciation, reords, repairs.

I hope this information to be useful to you

Yours sincerely

H.F. Duske

APR 10 1984

S.A. DEHOEY

société anonyme au capital de 200.000 f
tél. 60.27.66
rcs b 305 109 226 00018
db : banque de bretagne la baule

location/vente/achat
de tous appareils automatiques

APR 10 1984

A M O A
2000 Spring Road
Suite 220
OAK BROOK
ILLINOIS 6052I

La Baule, le 3 Avril I984

Dear Sir,

Referring to your letter of March 22nd., we have pleasure in letting you know how is juke-Box's fee in FRANCE.

I.- The amount of the fee is about $ 30 to $ 60 per year. That depends where the Juke Box is located:

BAR: Consumer selling prices,
How many seats
Opening Hours
Seasonal or not

ARCADE : How many machines and opening hours.

2.- The fee is collected by " SACEM " (our Copyright and Royalty Society) and disburded by location's owners.

3.- Before I98I, operators used to pay this fee. But since I98I, all the machines have been so surtaxed, that most of operators could not pay anymore this juke -box's fee. So now, either we pull juke box from location or the location s owner has to pay it, if he wants to keep juke-Box. For our part, we have pulled between IO and I5 juke box from our locations.

4.- The fee is going up about 7 and IO % per year.

5.- All that means, less juke Box in location.Most operators do not set any juke box alone, only with Video Game Pinballs, billiard etc... Besides, we have not bought any juke box for the last three years.

We hope you will be satisfied with these few informations.

Sincerly

DEHOEY M.C.

NSM
APPARATEBAU
GmbH & Co. KG

GESCHÄFTSFÜHRUNG

Mr. Leo A. Droste
Amusement and Music Operators
Association
2000 Spring Road, suite 220

OAK BROOK, ILL. 60521
U S A

April 27th, 1984
VGF/Hm

Re: Your letter of March 22nd, 1984

Dear Mr. Droste,

thank you very much for your letter of the end of March concerning the problem of copyright fees for jukeboxes. Today we would like to answer your questions in this matter.

In Germany the situation presents itself as follows:

The GEMA - the society for musical performance and copyright, charged with the collection of copyright fees including but not limited to those paid by operators for their jukeboxes - was founded as a society for artistical products by composers and publishers to protect the rights they were given through copyright regulations.

Since 1959, namely after the conclusion of a first joint-contract with the ZOA - our general operators' organization - this society has been collecting an annual fee from each operator for each of his jukeboxes. This annual fee amounted to DM 65,-- per year up to 1958 and has continuously been raised in the following years:

- DM 78,-- per year from 1959 to 1972
- DM 85,-- per year from 1973 to 1975
- DM 96,-- per year from 1976 to 1978
- DM 102,- per year from 1979 to 1983

At the beginning of 1984 the GEMA asked their contractual partner, the ZOA, to raise the royalty fee from 102,-- DM to 112,-- DM per year per jukebox.

On the other hand the ZOA, based on the changing jukebox-market since the beginning of 1978, has requested to reduce the annual fee of DM 102,-- effective since January 1st, 1979. Characteristic for this changing market is the considerable downward movement in the number of jukeboxes set up as well as a permanent and lasting decrease of the cash-receipts. The jukeboxes are more and more displaced by other musical equipment such as stereo-sets.

The operators cannot, for business reasons, accept another increase in the royalty fees because this would even worsen the competitive situation for the jukebox industry.

Therefore, the ZOA has, according to a resolution of its members of the general meeting, appealled to the arbitration board of the German Patent Office at Munich with its request for a reduction of the existing annual royalty fee to DM 76,50 and has initiated an arbitration process against the GEMA.

An arbitration board decision has not been submitted so far. Meanwhile the GEMA is not authorized to collect any higher fees than in the year 1983. It's therefore important, and all associations and publications in this matter do emphasize it, that no operator pays the increased charges, because this would be his silent acceptance which later could not be rectified any more.

So we find ourselves up in the air until the arbitration board decision will be made. As soon as the decision will be submitted to us, be sure, that we will inform you about it.

In the hope that this information helps you anyway, we remain

yours faithfully
NSM APPARATEBAU
Ullrich D. Schulze
Ullrich D. Schulze

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION

Responses To Senator Mathias's Questions

"I would appreciate your comments about both the practicability and the fairness of each of these proposals. The three proposed methods are as follows:

(1) Question: Inclusion of a 'performance right fee' in the price of recordings used in jukeboxes. (Obviously, some method would need to be found to avoid imposing this fee on noncommercial purchasers of recordings.)"

Response: AMOA could support a jukebox public performance fee which would be included in the price of 45 records purchased by operators. Since operators buy almost all of their records from one-stop distributors, the fee could be collected at that level and transmitted to the Copyright Office for distribution to the performing rights societies and other copyright claimants.

Such a system would result in several major improvements to the current law. All operators would pay the fee for every record purchased, so there would be complete compliance. Moreover, operators with marginal locations would have the flexibility to limit record purchases for those jukeboxes.

Additionally, the system would benefit copyright owners in a new way. The performing rights societies would know which songs were purchased and could determine exactly the percentages that each songwriter should receive. Furthermore, copyright owners who did not belong to one of the three major performing rights societies would be in a stronger position to establish claims to the jukebox royalty fees.

(2) Question: "Imposition of a one-time royalty fee on jukeboxes, paid by the manufacturer or purchaser. This one-time fee would amount to a payment in advance of the annual fees now paid by the jukebox operators. (S. 1734 proposes such a fee, but the amount of that fee could be different than that proposed in S. 1734). This fee could be fixed permanently, or adjusted from time to time by a federal agency or by Congress."

Response: AMOA believes this approach is the best one for achieving 100% compliance with the law since every new jukebox would be registered. Within a period of 7-10 years, there would be nearly total compliance with the law.

Although the performing rights societies have disapproved the one-time fee concept, their focus has been misdirected. The fee should be seen as advance payment for use for a 5-7 year period. The Copyright Office could place the fees collected in interest bearing accounts for distribution to the performing rights societies over time.

One caveat is in order. The fee must be established at a reasonable level and future adjustments must not be open-ended. Otherwise, jukebox operators could find themselves in the same precarious situation that they are in today.

(3) Question: "A pay-per-use system, in which jukebox operators would compensate songwriters based on the number of times that a jukebox is actually used."

Although AMOA believes this system has theoretical appeal, in practice it would result in more problems than it solved by increasing reporting burdens on operators and creating an administrative nightmare for governmental and private sector regulators. It is noteworthy that few other music users have chosen pay-per-use over the blanket licensing system because of its inherent problems.

With regard to compliance, this system could result in fewer jukeboxes on location and lower compliance for the remaining machines because of the additional burden placed on operators to report the number of plays per machine to the Copyright Office. We assume that the performing rights societies would seek the right to verify this data by reviewing the operator's books which would raise major concerns.

Responses To Senator Hatch's Questions

1. Question: "The current copyright royalty fee for jukeboxes is $50/year, or slightly less than $1/week. If an establishment is open five days a week, that works out to around 20 cents per day. How can such a small charge cause such disruption in the jukebox industry?"

Response: Operators do not claim that the copyright fee is the sole reason for the industry's decline. They do assert that the 525+% increase in the fee has placed yet another burden on them that many, perhaps a majority, cannot withstand. When added to other escalating costs, operators have had no choice but to pull jukeboxes or risk non-compliance.

One assumption in the question must be addressed. While most establishments are open five days a week, jukebox play is normally confined to Friday and Saturday nights. In a number of locations, moreover, there is only seasonal business, such as Florida during the winter. So, a large number of locations do not have the benefit of five-day, 52 week play. It should also be kept in mind that the jukebox is played only a few hours each day.

Further, AMOA's Cost of Doing Business Survey reveals that the average operator makes only $77 annual profit on a jukebox. This figure was computed without taking into account the copyright fee. One need only subtract the additional $50 from that figure to realize that the average jukebox cannot earn its way given this increased burden.

By placing a different perspective on the issue, one gets a more realistic sense of the scope of the problem. Under the previous $8.00 annual fee, it took 32 plays of a machine to pay for the copyright royalty. Under the current fee, it takes 200 plays. In the real world, that difference of 168 times a person must put a quarter in the slot is a very substantial one. One must also remember that the fee will increase with inflation beginning in 1987 even though operators as a practical matter cannot adjust prices to keep pace with inflation.

Finally, although other costs have increased, the copyright fee increase is of an unprecedented level and has hit operators particularly hard. They can and do take steps to control other costs -- they buy fewer records, purchase less expensive vehicles, and make fewer service stops for example. The only way they can reduce the excessive copyright fee, however, is by petitioning Congress for relief.

2. Question: "Based on the hearing held on June 20, do you have any additional suggestions about ways of making the jukebox royalty system fairer for both jukebox owners and songwriters?"

Response: As we stated at the June 20 hearing, AMOA will support any reasonable approach to resolve this issue. Operators want a fee they can live with and the highest compliance possible. Any evenhanded approach that can accomplish these goals would be supported.

Several ideas have surfaced that might lead to a fair resolution of this problem. From our perspective, S. 1734 or a modification thereof is one approach. Another would be to place a jukebox public performance fee on each record sold to operators. We would also consider a tiered payment system whereby the annual fee would decrease with the age of the jukebox.

We hope that the performing rights societies will offer serious alternative proposals to resolve this issue within the framework of a compulsory license. We stand ready to cooperate with them to improve the law.

3. Question: "If the Committee believes that it is appropriate to keep the current system of continuing royalty payments, but at an amount lower than the current rate, could the jukebox industry support such a resolution?"

Response: The industry could support such a solution if the fee were reduced to a level that would permit operators to stay in business. We would also like other deficiencies in the current law addressed as well, such as the inability to transfer certificates to replacement jukeboxes and the continuing possibility of open-ended fee increases.

Mr. LAWSON. Our next witness would be Mr. Don Van Brackel.

STATEMENT OF DON VAN BRACKEL

Mr. VAN BRACKEL. Mr. Chairman, my name is Don Van Brackel, and I am a jukebox operator from Defiance, OH. I have been in my family's business for nearly 30 years, but, I am a relative newcomer compared to my father, who began our company in 1926.

I am particularly pleased to be able to address you today, since I believe I have a unique national perspective on the jukebox industry, its past, its present, and future.

I use the word "future" cautiously, since your actions here will determine to a large extent whether we survive. My perspective is based not only on my experience in the business, but also my tenure as president of the Amusement and Music Operators Association in 1978, and the Ohio Music and Amusement Association in 1974.

Most important, however, is the fact that I was a witness at the Copyright Royalty Tribunal in 1980 on behalf of the jukebox industry. It is with a great deal of frustration and some anger that I tell you that if the CRT had listened to us and understood what we said, I would not be speaking with you this morning.

We told the CRT in 1980 that the jukebox industry was in trouble. We testified that we could not bear large fee increases and asked that they hold the line at $8. BMI asked for only a $30 fee, but ASCAP and SESAC requested a $70 fee, based on what they could get in the so-called free market. The CRT set a $50-plus figure based on marketplace analogy, but didn't grant the full $70 all at once, because they thought the marketplaces were somewhat different.

Now, I ask you, why would Congress have protected the jukebox industry with a compulsory license, set an $8 fee and instructed the CRT to set a fair rate if it wanted the CRT to set marketplace rates? To this day I don't understand what happened.

I know the seventh circuit upheld the CRT's actions, but this is true in almost all cases of judicial review of agency decisions. It does not mean that the decision was wise or fair.

Hindsight has taught us two lessons. First, we were right in opposing the CRT review of the jukebox royalty fee back in 1975. We feared then—rightfully, I believe—that we could not live with the possibility of open-ended increases, although in our worst nightmare we did not envision a 525-percent increase.

Second, we presented an accurate picture to the CRT. Since 1980, the enormous decline in machines registered and the continuing slump in new machines sold proves we were right. If the CRT had accepted the results of the Peat, Marwick, Mitchell survey and taken evidence on the copyright owners' need for increased fees, it could not have approved the 525-percent-plus increase.

Since the CRT hearings, we have had the University of Notre Dame prepare two new studies on the industry. These surveys, conducted by an impartial, highly respected institution, verify the earlier study's accuracy. But still, all we hear from our critics is a litany of condemnation of every aspect of the surveys' methodology, and the continued innuendos that the jukebox operators are dishonest. Quite frankly, I am sick of it.

We have told the truth for years to Congress and to the CRT, and we are telling it now when we say we can't live with the current jukebox royalty fee.

The opposition also condemns us for poor compliance. It isn't good, and we know it. It is probably less than 75 percent. But with the educational efforts of the industry and the compliance efforts of the performing rights societies, it would have gotten much better with time. The huge fee increase has forced many operators into choosing between noncompliance and pulling machines from operation.

Many choose to stay in business and take the risk. The increase is also causing the small businessman to believe the deck is stacked against them in Washington.

Finally, I must draw your attention to what I believe is an oversight in the copyright law. Nowhere does it consider the small businessman's ability to pay higher fees, and the copyright owners' need to receive additional compensation. The result in our industry is appalling. At a time when the jukebox industry is reeling, fees rose 525 percent.

At the same time, ASCAP's income hit a record level of over $200 million in 1983. I would guess that this is an enormous increase over its 1975 income before the Copyright Act was revised.

I believe that S. 1734 would help restore the balance between the copyright user's ability to pay and the copyright owner's right to compensation, and I urge this committee to consider it favorably.

Thank you very much for the opportunity to testify.

Senator MATHIAS. Thank you, sir.

[The prepared statement of Mr. Van Brackel follows:]

PREPARED STATEMENT OF DON VAN BRACKEL

My name is Don Van Brackel. My family's company, A. Van Brackel and Sons, operates jukeboxes, amusement machines and background music systems in Ohio and Michigan. My father began the business in 1926 and I joined it in 1956 while attending the Defiance College. During the 28 years that I have been active in the coin machine business, it has undergone many changes; some that are common to many small businesses, some that are unique to this business. When I started nearly three decades ago, there were over thirty operators in Northwest Ohio. Today, there are less than ten that would be considered independent operating companies. Some have simply gone out of business due to urban renewal and socio-economic conditions, while others have gone bankrupt or have been bought out by the survivors. This trend is not unique to our operating area, but is a nationwide problem.

I bring both a local and national perspective on the jukebox industry to these hearings. In 1978, I was President of the Amusement and Music Operators Association and I visited our state associations throughout the country. At that time, the jukebox operator's problems were growing in scope. These problems have accelerated rapidly since the imposition of the copyright royalty fee.

In addition, I feel particularly qualified to testify before you since I was a witness at the Copyright Royalty Tribunal's ("CRT") hearings on the jukebox fee in 1980. If only Tribunal members had understood what we were telling them then, we would not be before you today. The huge fee increases the CRT ordered have resulted in thousands upon thousands of jukeboxes being pulled from locations throughout this country. Only Congress can reverse this trend by setting a fee that is fair given the industry's economic condition.

At this point, I would like to explain how the jukebox business works. The general public sometimes believes that the only thing a jukebox operator does is collect money. Of course, knowledgeable persons realize that this is a fallacy, and that jukebox operators only make money if they provide first-rate services. First, the operator must find locations to put his equipment in, purchase equipment, buy records effectively, and install equipment to meet the customer's needs. This equipment consists of jukeboxes, speakers, volume controls, and intricate switching arrangements.

Programming records on a jukebox is another essential service that takes a lot of time and knowledge about each individual location in order to meet different customer's tastes in music. The programmer in my company has been performing this function for over 30 years. In addition to his own knowledge and experience, he deals personally with the salesmen of the "one-stop" distributors who supply our records and with manufacturers' representatives, who conduct promotional programs through all media simultaneously. Recording companies and new artists also will send us records to place on our jukeboxes to promote their works.

In addition, we must make regularly scheduled visits to our locations and do preventive maintenance, clean the jukebox, change records and title strips, and count and collect the money. We also provide emergency service in excess of eighteen hours a day every day of the year. Besides the operation of the equipment at the location level, we must also provide all aspects of company management, including office administration and recordkeeping, vehicle maintenance and operation, purchasing equipment and supplies, banking, accounting, and hiring and supervising the people who do these jobs.

Even once we have a location, and have purchased records and maintained the jukebox, our work is not done. We must also properly rotate our machines if we are to have any profit. When an operator purchases new jukeboxes and puts them in operation, the new machine is normally placed in the operator's most productive location. This gives him an opportunity to upgrade his pricing structure or possibly improve his sound system and other components of the installation. Once the new jukebox is placed, the used machine is brought into the operator's shop, completely overhauled, and placed in a location that has a two-year-old machine. This process continues until the operator reaches the least productive location, which in the normal course of business is a seven-year-old jukebox. New jukeboxes are depreciated over five years, but normally are used seven years. The older, fully depreciated machines are placed in locations that cannot carry the burden of depreciation. As you move down the line to the less productive locations, price resistance increases dramatically. These are the jukeboxes that are being pulled from operators' routes since they are most affected by the present copyright fee.

I have heard the argument that operators should merely raise prices to pay the copyright fee, but proponents of this position just do not understand the business. Changing pricing structure is perhaps one of the most difficult tasks an operator faces. Our locations are probably the smallest entrepreneurs left in this country. They are typically Ma and Pa operations catering to a neighborhood clientele who are extremely price sensitive. Oftentimes they prefer to keep their older jukebox rather than accept a pricing change. We are, therefore, effectively prevented from keeping pace with inflation, even if the coin acceptance slot could be adjusted, which it cannot.

One other item of background information is relevant. The jukebox operator's financial arrangement with the location owner can vary from place to place, but most commonly we split proceeds 50-50. Some operators have succeeded in getting 60-40 splits or guaranteed minimums. The industry norm, however, is the 50-50 split, and most location owners would balk and even demand removal of the jukebox if they were asked to accept less.

The copyright fee is dealt with in different ways. Some operators will try to take it off of the top. In my experience with operators throughout the country, however, most must pay the full fee from their share of the revenues.

The copyright fee's effect on the industry has been dramatic. Since 1978, we have experienced a ten percent reduction per year in the number of jukeboxes we have operated. This year, we will be forced to pull approximately 25% of our route now that the $50 fee is in place.

Moreover, in the state of Ohio alone, the number of jukeboxes registered with the Copyright Office has declined by over 2500 since the law took effect. Based on my company's experience, I expect that this decline will accelerate even more rapidly until the end of the decade.

The machines being pulled from active duty are the oldest machines at the lowest income locations. Their removal creates two rather dramatic problems. The first affects the copyright owner since the jukebox no longer exposes and promotes his works and the operator no longer pays a copyright fee for the jukebox or the records. Second, the operator and the manufacturer are affected because the location produces no income and reduces the need for further purchases of new jukeboxes that would be used in the normal rotation of machines. The loss of so many locations in Ohio alone since 1978 is a poignant illustration of the jukebox industry's problems and its dire future absent Congressional relief.

I firmly believe that the reduction of jukeboxes on our route is not unique, but is the national trend. This belief is buttressed by the rapid decline in registered jukeboxes nationwide as reported by the Copyright Office. I acknowledge that the jukebox industry was in a steady downward trend even before the 1976 copyright bill passed. Since the statute has been implemented, the steady drop-off in machines manufactured and registered annually has become an avalanche.

There are other problems with the copyright law as it pertains to our industry. Aside from the exorbitant fees, compliance is virtually impossible. We are required to purchase licenses in January of each year and have them in place within ten days of receipt from the Copyright Office. The required stickers are tied to specific jukeboxes by the machine's serial number. They are not transferable and must be visible for public inspection. We usually receive our stickers in late March, early April or May. My company can be in technical violation of the law from February 10 to the time the stickers are placed on the machines, usually ninety days. If we happen to sell a machine during that time, the $50 sticker is worthless, since it cannot be transferred to another jukebox. For example, I sold twelve jukeboxes this year before their licenses arrived and therefore had to forfeit $600 for licenses I could not use.

It is not hard to understand, therefore, why we have an industry compliance problem when those of us who do attempt one hundred percent compliance can be in constant violation. A 525+ percent increase in royalty fees plus mounting operating costs in a diminishing marketplace spell doom to an industry that is as American as apple pie and baseball. Even if the operating companies somehow survive for a period of time, we are deathly afraid that we will lose our two remaining domestic manufacturers as their unit costs increase due to continued declining sales. The average cost for a new jukebox has soared to over three thousand dollars, a figure that makes normal replacement prohibitive. Hence, we will find less production and higher unit costs followed by higher prices and stagnation. We need only to look to the auto and steel industries in this country to draw a comparison.

Who benefits from the demise of an industry? The obvious answer is nobody; not the copyright owner, the jukebox operator, the manufacturer, the location owner or the thousands of employees of the various entities. The public also suffers since it is being deprived of an affordable form of enjoyable entertainment. The loss of so many jukeboxes in Ohio and throughout the nation is a tragedy for the people who enjoyed having the ability to choose the music they would hear at a reasonable price.

S.1734 would go a long way toward revitalizing the jukebox industry. The bill recognizes the fairness of paying for the use of copyrighted works, but in a way that is easily administered, easy to comply with, and easy to enforce. I believe it would greatly enhance the survival of this important form of exposure for creative works.

Furthermore, I strongly believe S. 1734 would encourage growth and expansion of the jukebox industry and in so doing benefit copyright owners. The net result of an expanded industry would be an increased royalty pool from new jukebox sales and record purchases.

In closing, I feel compelled to discuss a concern that has bothered me ever since I became involved in the copyright arena. I have never understood why the copyright owner does not have to demonstrate a need to receive increased fees. The Copyright Royalty Tribunal refused to even permit testimony on this issue. How can a fair fee be determined without this evidence? In my opinion, it cannot. The right of the copyright owner to be paid must be balanced by the copyright user's ability to pay and the copyright owner's need for more money. With all due respect to the authors of the present copyright bill, hindsight indicates that the scale was not fairly balanced. Now is your chance to correct this problem.

Again, I believe in compensating copyright owners, but I do not believe that the fee should be so high that it drives people out of business. The 525+ percent increase is ridiculous at a time when the jukebox industry is in such serious trouble. S.1734 coupled with the mechanical fees that are passed on to operators when they buy records is, in my opinion, a fair and equitable system for compensating copyright owners considering the depressed state of the jukebox industry.

Mr. LAWSON. Our next witness would be Mr. Jerry Gordon, who represents the manufacturers.

STATEMENT OF JERRY GORDON

Mr. GORDON. Good morning, Mr. Chairman, and many thanks for the opportunity to testify. My name is Jerry Gordon. I am president of distributor operations for the Nation's largest manufacturer of jukeboxes, Rowe International, Inc. We have 18 branches throughout the country, and our machines are sold to operators in every State in the Union.

In some ways, however, it is more important to tell you who I am not, in order for you to weigh my testimony. I am not a jukebox operator. I do not have to pay any copyright royalties. I am not under the jurisdiction of the Copyright Royalty Tribunal and I am not here asking you to relieve me of any fees.

Rather, I have asked to testify because the fees that have been set by the Copyright Royalty Tribunal, the CRT, have been absolutely disastrous for my customers, the jukebox operators. That, in turn, has harmed business significantly. Since the fees have risen from $8 annually to $25, and then $50, sales of machines in this country have dropped dramatically.

The following graph, prepared by the accounting firm of Coopers & Lybrand, shows clearly what I am talking about.[1] The graph's bottom line--the graph is in my statement—shows actual sales of all jukeboxes in the United States since 1976. The top line shows where sales would have been if this industry had simply kept pace with the rest of the economy during the same time period.

As you can clearly see, the decline in sales was the greatest in the first year of the $25 fee—1982. Indeed, in the first 2 years after the CRT decision, sales plummeted 30 percent.

I am sure that the CRT, in making its decision, sincerely believed that the increased fees would not damage the jukebox industry. Regrettably, the CRT was just plain wrong. Our customers are pulling machines off the market in substantial numbers as a result of the increased copyright fees. In 25 years in the business, I have never seen anything like it.

All the fancy economic rationalizations and numbers crunching can't disguise the one pertinent fact—with the increased fees, particularly the $50 fee, huge numbers of machines are no longer profitable and are being removed from the market. This is a fact that cannot be explained away. This is a dying industry.

I urge the committee to look beyond the actual dollar amounts to consider the very practical workings of this industry and the fees involved. Under the previous $8 annual fee, it took 32 plays of a machine to pay for the copyright royalty. Under the current fee, it takes 200 plays. In the real world, that difference of 168 times a person must put a quarter in the slot is a very substantial one. There are, of course, prime locations that can absorb this increase in business necessary to make a profit, but many cannot, Mr. Chairman.

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[1] See chart on page 203.

The four remaining manufacturers of jukeboxes, two of whom are actually importers, have taken an active role in this controversy. We have felt strongly enough about the issue that we have collectively agreed to support legislation that would shift the economic burden from the operators to us, S. 1734. I would guess that this is not something the committee usually sees. But we know full well that unless some relief is not forthcoming, our businesses will be in jeopardy as well. I hope you will take into account how seriously impacted the manufacturers have been as well.

I have heard some representatives of the performing rights societies argue that jukeboxes are an obsolete form of entertainment that is dying and probably deserves to die. As someone who knows this industry well, I emphatically disagree. The jukebox is a unique American art form that can survive, even in the era of video entertainment. It serves an entirely different function than the videos. Jukeboxes provide a more social type of entertainment—because people can talk and interact with each other while the music is playing. The videos—both music and games—are much more solitary activities.

So the jukebox can survive because it continues to serve a unique function that people still want. But while it is not a dying art form, as a matter of public taste, it certainly isn't strong enough that it can't be killed. And the $50 fee is killing it.

Don't forget that the people who actually use jukeboxes do not have unlimited resources. They are, by and large, working people with limited funds. They generally do not own fancy stereo systems and expensive tape decks. Today, jukeboxes represent a reasonably priced form of entertainment. When jukebox fees get too high, they have no choice. They simply stop paying.

Frankly, I am baffled, absolutely baffled, by the hysteria raised over this issue by one of the performing rights societies. This proposed legislation is not a grand conspiracy to destroy the copyright system by the jukebox industry. Just the contrary. It is an attempt to prevent the copyright system from destroying us.

When Congress, in its wisdom, decided to make jukebox licenses compulsory, the underlying premise was that the marketplace powers of the two parties was vastly different. The same is also true of the respective legislative powers. I know the jukebox operators well. By and large they are small business people who work very hard, operate at low margins, and have little political or economic clout. Most that I know very much want to comply with the law. But many are caught in a terrible dilemma—compliance 100 percent may drive them out of business.

The alliance between the manufacturers, distributors, and operators on this issue is a steadfast one. But we can't offer you the stars, the glamour, the slick lobbying campaigns that the other side can. We don't have anywhere near the economic resources. And to make matters worse, we have to convince you to take action because no legislation guarantees the status quo. There is no possible administrative relief. If there is any change made in the fee structure, it must come from a change in the law.

In short, we are in a serious bind. We have made every effort to seek a compromise with the other side, but to date none has even been seriously considered. If you listen to us politely and then do nothing, you will in effect have voted against us. All we ask is that you give us a change to present the case for legislation to the committee and the Senate, and let us argue on the merits.

I want to make it absolutely clear that from a manufacturer's perspective, S. 1734 is an excellent piece of legislation, even though it imposes on us a fee for the first time. But in my view any compromise that the committee chose to support that has the effect of providing actual relief from the current excessive fees would be welcomed.

Senator Zorinsky has performed a fabulous service by putting a proposal on the table. I hope the committee will use it as the starting point in developing legislation this year.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Mr. Gordon.

[The prepared statement of Mr. Gordon follows:]

PREPARED STATEMENT OF JERRY GORDON

Good morning and many thanks for the opportunity to testify. My name is Jerry Gordon and I am President of Distributor Operations for the nation's largest manufacturer of jukeboxes, Rowe International, Inc. We have 18 branches throughout the country and our machines are sold to operators in every state of the Union.1/

In some ways, however, it is more important to tell you who I am not, in order for to weigh my testimony. I am not a jukebox operator. I do not have to pay any copyright royalties. I am not under the jurisdiction of the Copyright Royalty Tribunal and I am not here asking you to relieve me of any fees.

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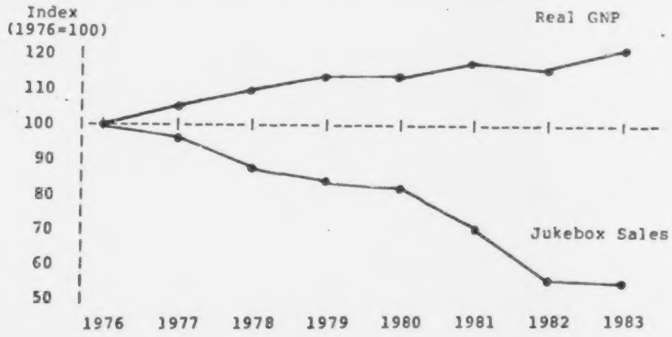
The following graph, prepared by the accounting firm of Coopers & Lybrand, shows clearly what I am talking about. The graph's bottom line shows actual sales of all jukeboxes in the



1/ Our distributor offices are located in Arkansas, California, Colorado, Florida, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, New York, South Carolina, Tennessee, and Texas.

United States since 1976. The top line shows where sales would have been if this industry had simply kept pace with the rest of the economy during the same time period.

As you can clearly see, the decline in sales was the greatest in the first year of the $25 fee--1982. Indeed, in the first two years after the CRT decision, sales plummeted 30 percent.

I am sure that the CRT, in making its decision, sincerely believed that the increased fees would not damage the jukebox industry. Regretably, the CRT was just plain wrong. Our customers are pulling machines off the market in substantial numbers as a result of the increased copyright fees. In 25 years in the business, I have never seen anything like it.

The performing rights societies will argue that the demise of the jukebox industry is related more to cost of living factors and changes in the market. Surely, other forces have been at work. Inflation and shifting market patterns have caused problems for the industry. That is precisely why the $50 fee has done such damage. For many operators it has been the final blow. An industry that otherwise was booming and growing might have been better able to absorb the increases.

But all the fancy economic rationalizations and numbers crunching can't disguise the one pertinent fact--with the increased fees (particularly the $50 fee) huge numbers of machines are no longer profitable and are being removed from the market. That is a fact that cannot be explained away. This is a dying industry.

I urge the Committee to look beyond the actual dollar amounts to consider the very practical workings of this industry and the fees involved. Under the previous $8.00 annual fee, it took 32 plays of a machine to pay for the copyright royalty. Under the current fee, it takes 200 plays. In the real world, that difference of 168 times a person must put a quarter in the slot is a very substantial one. There are, of course, prime locations that can absorb this increase in business necessary to make a profit, but many cannot.

For the life of me, I cannot understand how the decline of the jukebox industry in this fashion benefits the artists for whom the fee is intended--it certainly reduces the outlets for their works, if nothing else.

The four remaining manufacturers of jukeboxes (two of whom are actually importers) have taken an active role in this controversy. We have felt strongly enough about the issue that we have collectively agreed to support legislation that would shift the economic burden from the operators to us (S. 1734). I would guess that this is not something the Committee usually sees. But we know full well that unless some relief is not forthcoming, our businesses will be in jeopardy as well. I hope you will take into account how seriously impacted the manufacturers have been as well.

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Mr. LAWSON. Thank you, Mr. Chairman, and, of course, we are available for any questions.

Senator MATHIAS. One of the interesting parts of this job is to try to piece together all the parts of the puzzle that is the American economy, how it works, and what makes it work. You have at that table an institutional memory that extends over a lot of years of this particular industry.

What happened in the jukebox industry when Mr. Petrillo closed down a lot of the music in this country? Senator D'Amato was teasing me about my advanced age, but I am old enough to remember when you turned on the radio and you only got one song, because Mr. Petrillo had cut off the music.

How did the jukebox industry react to that?

Mr. LAWSON. Well, sir, at that time, if my memory serves me correctly, we were just forced to buy any recordings that were available to us.

Senator MATHIAS. But there were some?

Mr. LAWSON. Oh, yes, there were recordings available to us.

Senator MATHIAS. You were affected by that situation?

Mr. LAWSON. I don't recall too much of an impact, really.

Senator MATHIAS. It was primarily on radio, then, and not on jukeboxes. Do you recall the incident I am referring to?

Mr. LAWSON. Yes, I do, sir.

Senator MATHIAS. I am trying to judge how the free market works in the jukebox industry as compared to other parts of the entertainment industry.

Senator Zorinsky has pointed out, and accurately, that, of course, you are subject to many charges. It is not simply a case of moving a box into a commercial location and collecting the money. There is a lot that goes on before you get to the opening of the coinbox and counting what is in it. You have to service the machines, which includes delivering them and picking them up. You have to hire people to service them. You have all the attendant expenses that are involved.

Most of the costs are determined by free market forces.

What about free market bargaining between the jukebox owners and those who sell the musical compositions, that are played in the boxes?

Mr. VAN BRACKEL. Mr. Chairman, I would like to respond to that question. I don't feel we can have a free market situation in that our relationship with the copyright societies is such that we either must take it or leave it.

The artists cross over from one society to another. It is very difficult to find a recording that doesn't have both ASCAP and SESAC licenses. So, you know, I don't see that there can be a free market out there.

The only bargaining we would have, if any at all, is if, in fact, we do not want to use their music, we just take the machines out.

Senator MATHIAS. What I am really asking you is, do you see any way that we could construct a marketplace so that you could have a free market?

Mr. VAN BRACKEL. No, sir, I don't.

Senator MATHIAS. So you don't see any alternative to the Tribunal, then?

Mr. **Van Brackel**. No, sir. I don't see that there is—in the business as I know it, it does not exist, there is not a free market.

Senator **Mathias**. S. 1734 suggests a one-time fee. The figure that is proposed in the bill is $50. I have no idea what the Tribunal might ultimately conclude was a proper figure. Of course, the Congress could arbitrarily adopt $50, or $30, or $80, or whatever the figure might be. But assuming that fee were set on a free market basis and further assuming that the $50 annual fee set by the Tribunal is closer to the actual market price than the $8 entry fee that was adopted by the Congress, we might end up with something higher than the $50 one-time fee.

Would the industry be willing to do that if it were, say, substantially higher than $50, if we came out, finally, with a one-time fee that was $100?

Mr. **Lawson**. Mr. Chairman, as I have stated in my testimony, we are willing and have been willing and have made the effort this past winter to sit down with ASCAP, BMI, and SESAC, to try to negotiate something. We are still willing and able to sit down with the copyright societies and try to work out something that is going to be equitable for our industry.

Now, I can't say that the $100, or $75, or $50, or whatever it is, is the magic fee.

Senator **Mathias**. And I certainly am not suggesting that. At this point I would not have any real idea what would be an equitable rate.

Mr. **Lawson**. Yes, sir, I understand that, but I did want you, the committee, to understand that we are more than willing to sit down with the copyright societies and negotiate anything that would be equitable for our industry.

Senator **Mathias**. Do you agree with Mr. Van Brackel, however, that free market bargaining really isn't in the picture?

Mr. **Lawson**. Yes, sir, I do agree with that.

Senator **Mathias**. I do have other questions for the witnesses. As I said earlier, however, the Senate is now in session and we are under some time limitation. I am therefore going to submit those questions to the witnesses in writing. At this point I might also say that other Senators, Senator Hatch in particular, have questions that they want to submit in writing. We will ask you and the other witnesses who appear here today to respond to those written questions, and we will make those responses part of the hearing record.

Senator Zorinsky.

Senator **Zorinsky**. I would like to just add that the first thing you have to do when you buy a jukebox is find somebody to finance it under 18 percent interest before you can do anything, and after you find somebody to finance it, they will finance it if they don't have to go on recourse for it.

Recourse, of course, means that if you miss a couple of payments that the bank ends up with the jukebox, and the bank keeps telling us that they are not in the jukebox business, they are in the finance business.

So, to become acquainted or involved in this type of business, is a unique experience, Mr. Chairman, and I think the focus of this hearing has been on the bill as it properly should be, but I think in order to come to some type of a solution as to whether this bill should be enacted or should not be enacted, it definitely requires an understanding of the jukebox business and how it operates insofar as its ability to continue to exist as a viable industry and a taxpaying entity that has been paying taxes to its country for many, many years.

So I hope we don't lose sight of the overall picture, and get bogged down in this one-time tax or should it be $50, or should it be $100. I think the bottom line of what this is all about is equity for both sides, and nothing being set in concrete, and I find this entire situation unique in that a semi-, quasi-Federal agency being the collector for a group of people collectively banded to get their money from the Copyright Act.

But that being as it may, as I understand, the salary for being on the Copyright Tribunal, which is five commissioners, as I understand it, is approximately $50,000 a year, and I don't think many taxpayers realize that.

I don't know if that money is paid from the Federal Government or not. I think they do use Federal space, but I will reserve those questions for the Tribunal people.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Senator Zorinsky. I think you are right that Congress has to have a full understanding of the industry, and all the stresses and strengths of the industry.

I see Governor Peabody in the room. He knows the community in which I grew up, which is a relatively small town, rurally based, in which jukeboxes were important. I personally knew the local businessman who was in the business of servicing and renting and installing jukeboxes, and I observed his operation over a period of years. I think I understand exactly what you are talking about. It is not just as simple as it looks.

I think the Congress has to take that into account. I am with you on that wavelength.

Gentlemen, thank you very much. We will be sending you some written questions.

Mr. LAWSON. Thank you, Mr. Chairman.

Mr. VAN BRACKEL. Thank you, Mr. Chairman.

Mr. GORDON. Thank you.

Senator MATHIAS. Our next panel will consist of Mr. Hal David, the president of the American Society of Composers, Authors and Publishers, commonly known as ASCAP; Edward M. Cramer, president of Broadcast Music, Inc.; and Mr. Vincent Candilora, executive vice president of SESAC.

Gentlemen, it is a pleasure to have you with us today.

STATEMENTS OF HAL DAVID, PRESIDENT, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, ACCOMPANIED BY BERNARD KORMAN, GENERAL COUNSEL; EDWARD M. CRAMER, PRESIDENT, BROADCAST MUSIC, INC., ACCOMPANIED BY GOV. ENDICOTT PEABODY; AND VINCENT CANDILORA, EXECUTIVE VICE PRESIDENT, SESAC, ACCOMPANIED BY NICHOLAS ARCOMANO, COUNSEL

Mr. DAVID. Thank you, Mr. Chairman. I would like to thank you for the opportunity to appear before this committee and express my views.

I am a songwriter by profession, and at this time I am privileged to represent my fellow songwriters as president of ASCAP.

Now, if I may, before I tell you what a songwriter is, I would like to tell you what a songwriter is not. A songwriter is not like Frank Sinatra, Barbara Streisand, Michael Jackson, or any of our other superstars who earn huge sums of money. They are in it as performers, not as songwriters.

The songwriter is really just a small businessman. In fact, he is the smallest kind of businessperson. He is his own receptionist, his own secretary, his own staff. In short, he works alone. And songwriters have to make a living like everyone else. They get married, they raise families, they pay taxes, they have mortgage payments and, if they have children, such as I do, they send their children through school. If they can't make a living writing songs, they just have to do something else.

Imagine all the great music that would have been lost to the world if people like George Gershwin, Irving Berlin, Aaron Copland weren't able to make a living writing songs and had to do something else. And you should think about all the other songwriters whose names you have never heard, who made their living writing songs, names like Maceo Pinkard, who wrote "Sweet Georgia Brown," Herman Hupfeld—nobody knows his name. He wrote "As Time Goes By." Jimmy Kennedy, who wrote "Red Sails in the Sunset," and "South of the Border."

The music business has changed radically since I started out over 30 years ago. Sheet music was probably the most important part of my income in the beginning. Now, thanks to the invention of the Xerox machine, it is so negligible as to be nonexistent. Records. There were once over 125 active record companies, and now, thanks substantially to the home taping phenonom, there are just a handful, and that means there are fewer and fewer records being made, fewer and fewer songs being recorded, and fewer and fewer chances for a writer to make a living.

The last bastion for songwriters is what they earn for the performance of their words. I license my performing rights through ASCAP, and I want to tell you I couldn't make a living as a songwriter without my ASCAP income, and if somebody who has had my success can say that, just imagine how it must be for the struggling songwriter and the new writers trying to break into the business.

Music creates such goodwill for us all over the world. Anywhere you go, you hear American songs. It goes places our diplomats can't go. It not only earns America goodwill, it earns good dollars, and is very important to our balance of payments.

I guess the trouble with music is that it is intangible, in the air. I guess some people believe it should be as free as the air. It is not as tangible as something like an automobile. Can you imagine buying a car, paying for the first tank full of gas, and never having to pay for gas again for as long as you own the car, no matter how many times you fill the tank?

Well, that is what S. 1734 is all about, and that is why we are opposed to it. After having a free ride for 67 years, 67 years during which jukebox operators were exempt from all royalty payments for the use of music, they are now asking Congress for the next best thing to a free ride, a one-time fee of $50 for the life of the jukebox, a one-time fee which is nothing more than a buyout of our music.

This violates the most fundamental concept of copyright, that there should be continuing payments for the continuing use of our work.

Music is the basic raw material of the jukebox. Can anyone believe that it is unreasonable to pay only 14 cents a day for the music which is the bread and butter of the jukebox business? Songwriters should not be forced to subsidize jukebox operators.

This bill demeans the valuable contributions the music players have made to our national heritage.

Thank you again, Mr. Chairman, for allowing us this time.

Senator MATHIAS. Thank you, Mr. David.

[Material submitted for the record follows:]

PREPARED STATEMENT OF
THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

SUBMITTED BY HAL DAVID

INTRODUCTION AND SUMMARY

The American Society of Composers, Authors and Publishers ("ASCAP") is opposed to S. 1734, the "Coin-Operated Phonorecord Player Copyright Act of 1983", introduced by Senator Zorinsky.[1] We urge the Subcommittee to reject the bill.

The single "product" sold to the public by jukebox operators is the public performance of music. To hear music is what the public wants and pays for. To sell music the jukebox operator needs permission from the creators and owners of the music.

Jukebox operators did not compensate copyright owners one penny for the public performances of their copyrighted musical compositions until 1978. Until then, jukebox operators enjoyed the benefit of a 1909 exemption for performances by means of coin-operated devices -- an exemption not intended for the modern jukebox. This exemption, long and widely recognized as unfair, was finally repealed by the 1976 Copyright Act.

The 1976 Copyright Act created a compulsory license for jukebox operators, at the request of the operators themselves, who were unwilling to deal with copyright owners in the normal marketplace the way other commercial users do. The compulsory license required them to pay an annual license fee for their jukeboxes; established a new federal agency, the Copyright Royalty Tribunal ("CRT"), to review the license fee every ten years, and adjust it to a reasonable level; and set the initial license fee at the token sum of only $8 per jukebox for each of the years 1978, 1979 and 1980. Congress explicitly recognized that $8 was an unreasonably low annual fee, and after full hearings, the CRT adjusted it, phasing the fee up to $50 in 1984.

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[1] A companion bill, H.R. 3858, was introduced in the House by Congressman Breaux. No hearings on that bill have been scheduled.

S. 1734 would drastically alter the current law:

-- S. 1734 would abolish the annual royalty now paid by jukebox operators to copyright owners for the right to continue performing their music and, instead, substitute a one-time "buy-out" payment. This would radically change the method of compensation for the public performance right under the compulsory license which Congress established only a short time ago. It would also undermine the copyright royalty system. That system -- which has been the economic basis for copyright since the first copyright statutes -- contemplates continued compensation to copyright owners for the continuing right to use their property.

-- S. 1734 would go even further and abolish the periodic review of the license fee. The bill would freeze the royalty for all time at only $50 for new jukeboxes, and only $25 (or less) for existing jukeboxes. The jukebox operators sought just such a freeze in 1976. Congress considered and rejected that notion, voting instead for periodic review. As Congress then determined, given changing economic circumstances, periodic review of any flat dollar fee is vital.

-- S. 1734 would set the fee permanently below the $8 annual rate Congress said was too low in 1976. Jukebox spokesmen admit that the average life of a box is as long as

14 years. Even if the life of a box were only 10 years, a $50 buy-out would amount to only $5 per year.

-- S. 1734 would overturn the decision of the CRT which was upheld in all respects by the United States Court of Appeals for the Seventh Circuit. In 1981, the CRT, after full hearings and on a voluminous record made by the jukebox operators and copyright owners, established reasonable license fees to be paid by jukebox operators for the years 1981 through 1990. The jukebox operators, through S. 1734, seek to replace that fee with a one-time "buy-out" at $50, a sum unrelated to any economic reality, and far less than the annual $8 fee Congress said was too low in 1976.

Not one of the justifications offered by the jukebox operators in support of S. 1734 is valid. Their claim of economic hardship, a claim they have made for decades, appears to be as spurious now as it has proved to be before. And, as we shall demonstrate, the economic "evidence" proffered by the jukebox operators now, as in the past, is biased, unreliable and in direct conflict with other evidence, much of it their own, which shows that the jukebox business is well able to pay the current modest copyright fee of only $50 per year -- less than 14¢ per day.

Even if some jukebox operators have fallen on hard times, the cause is not the modest copyright fee. We believe that if data were available, it would show other causes -- for example, increases in labor, maintenance, fixed costs and capital assets. And some remedies are within their control -- for example, pricing policies and their split of revenues with location owners.

The jukebox operators' claim that copyright owners are adequately compensated for the use of their music by payment of so-called mechanical royalties merely confuses the mechanical royalty, paid by record companies in return for the right given to them to record and distribute phonorecords of copyrighted music, with the very different right of public performance. Both are distinct and separate rights of copyright owners under the 1976 Copyright Act. 17 U.S.C. §106 (1976). Record companies make records; jukebox operators perform music publicly. The former need licenses to record; the latter need licenses to perform.

The jukebox operators' claims that the current law is difficult to administer and that S. 1734 would aid enforcement are equally without foundation. The Copyright Office effectively administers the compulsory license system, and the cost of administration is borne by the copyright owners, not taxpayers. The present system puts the burden of enforcement on copyright owners. But, because it would abolish the need for a certificate on licensed boxes and encourage noncompliance, S. 1734 could make enforcement more difficult than it is now.

Finally, S. 1734 is not necessary to improve compliance with the law. Compliance with the current law is administratively simple. Nevertheless, despite the simplicity of compliance, the jukebox operators themselves say that less than half of the jukeboxes are registered. The reason for noncompliance is also simple: the operators have flouted the law. This bill suggests that, because the law has been flouted, it should be eased. That logic is specious, to say the least -- it would reward lawbreakers for defying the law. S. 1734 is merely a transparent effort to obtain lower license fees than those found to be fair and reasonable by the CRT and the Seventh Circuit.

Congress must not lose sight of the value of music to jukebox operators. Music is the basic raw material of their business. The jukebox operators themselves have characterized their business as "music vending." It is hardly unreasonable to pay but 14¢ a day for the raw material they are selling. Significantly, jukebox operators in foreign countries pay far more than $50 annually for the right to perform copyrighted music (including American music). In 1980, the average annual jukebox fee in the 19 foreign countries that were surveyed was over $90.

American music is of immense value to our country. It is one of our best goodwill ambassadors abroad -- an aspect of our culture that is admired and respected by people everywhere. It is a bright spot in our otherwise gloomy balance of trade -- far more flows back to our country for the use of American music overseas than we pay for our use of foreign music, because our music is so much more widely performed abroad.

The Chairman of this Subcommittee has introduced a resolution commemorating the bicentennial of the Constitutional foundation of our copyright law, S.J. Res. 165. His eloquent remarks on the value of intellectual property are especially pertinent to the issue before the Subcommittee today:

> Many years ago, Dr. Samuel Johnson, the great 18th century moralist, philosopher and lexicographer, observed, with characteristic asperity: 'No man but a blockhead ever wrote except for money.'
>
> If as thoughtful and experienced a man as Dr. Johnson recognized the importance to creative writers and scholars of the prospect of accumulating a kind of property right in their writings as an incentive to work and ambition, it would underscore the interest of society which benefits from such creative work.

> Much has changed since the drafting and adoption of our Constitution. But through it all, man's nature has been one of the constants, and our protection of intellectual property has served the great interest of society.

Cong. Rec., S.12440, September 19, 1983.

Congress must not demean this great American contribution to world culture, this extraordinarily valuable American asset -- American music -- by adoption of a special interest measure like S. 1734.

I. S. 1734 WOULD UNDO THE 1976 COMPROMISE CONGRESS ENACTED AFTER DECADES OF CONSIDERATION.

Because of an anomalous provision of the old, 1909 Copyright Law, jukebox operators did not pay one penny for the raw material used in their business -- the performing right in copyrighted music. Every neutral party which examined the issue -- including the State Department, the Register of Copyrights and the American Bar Association -- favored repeal of this exemption. After decades of study, Congress agreed in 1976 that this free ride was unfair and concluded that jukebox operators should pay a reasonable fee for their continuing use of others' musical property.

A. The 1909 Exemption

The 1909 Copyright Law was enacted long before the invention of the jukebox. In the final days of Congressional hearings on the 1909 law, a question arose as to how to treat certain coin-operated amusement devices then found in "penny parlors." These devices were remote ancestors of today's jukeboxes: a patron would insert a penny, put on a set of earphones, and hear the single musical selection being played (no choice was offered to the patron). The copyright owners of music felt that these uses were of no economic significance, and agreed to an exemption which was written into the 1909 Law. 17 U.S.C. §1(e) (repealed 1976). See, H.R. Rep. No. 2222, 60th Cong., 2d Sess. 9 (1909).

In the 1920's, the modern jukebox was invented. These jukeboxes bore no resemblance to the old penny parlor devices. But the language of the 1909 law, however inadvertently, exempted them from copyright liability. Thus, creators and copyright owners received nothing for jukebox performances of their musical property, although the public deposited untold billions of dollars into the cashboxes of these machines and the pockets of those who owned them.

The exemption, as applied to jukeboxes, was widely recognized as unfair and, from 1925 on, Congress repeatedly considered its repeal. There was no question that it would be abolished when Congress began considering a complete revision of the copyright law in the mid-1950's. Indeed, the Congressional reports on the 1976 Act recognized the unfairness of this historical accident:

> No provision of the present law has attracted more heated denunciation and controversy than the so-called jukebox exemption. . . .
>
> This blanket exemption has been widely and vigorously condemned as an anachronistic 'historical accident' and in terms such as 'unconscionable,' 'indefensible,' 'totally unjustified,' and 'grossly discriminatory.'

S. Rep. No. 94-473, 94th Cong., 1st Sess. 95 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 111-12 (1976).

In response to Congress' request for a report on the issue, the Register of Copyrights recommended in 1961 that the exemption either be repealed, or replaced with a requirement to pay reasonable royalties:

> The jukebox exemption is a historical anomaly. The exemption was placed in the

> law in 1909 at the last minute with virtually no discussion. The coin-operated music machines of that day were apparently a novelty of little economic consequence. The jukebox industry is now among the largest commercial users of music, with an annual gross revenue of over a half-billion dollars.
>
> Jukebox operators are the only users of music for profit who are not obliged to pay royalties, and there is no special reason for their exemption. . . .
>
> The jukebox exemption should be repealed, or at least should be replaced by a provision requiring jukebox operators to pay reasonable license fees for their public performance of music for profit.

Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, House Judiciary Comm. Print, 87th Cong., 1st Sess. 31-32 (1961).

The resulting bills which were introduced would simply have repealed the exemption, treating jukebox performances like all others, to be licensed by the copyright owners or their representatives.

However, the jukebox operators opposed any normal negotiations for performing rights licenses in the free marketplace. And in 1967, when the House was about to pass the copyright revision bill, the jukebox operators demanded a statutory compulsory license in place of outright repeal of the exemption. Such a provision was included in subsequent revision legislation.

The Senate and House Judiciary Committees reporting on the 1976 Act concluded, in identical language, that the continuance of the 1909 exemption was not justified:

> The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoy any exemption.

S. Rep. No. 94-473, 94th Cong., 1st Sess. 96 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 113 (1976). The exemption was repealed and replaced in the 1976 Copyright Act with a compulsory license system providing for payment of annual license fees to copyright owners by jukebox operators.

B. S. 1734 Would Repeal the 1976 Compulsory License Demanded, In Place of Normal Licensing, By the Jukebox Operators Themselves.

The jukebox interests fought hard to avoid the normal licensing obligation the Copyright Law requires of similar commercial users of music. They won a compulsory license of their own devising.

The compulsory license system for jukeboxes which the operators fought for and won had three key elements. They were:

1. Payment of an annual license fee;
2. Periodic review of the license fee every ten years to account for changed economic circumstances;
3. Setting of the initial fee at $8 for 1978, 1979 and 1980, subject to adjustment to a reasonable level by the CRT in 1980.

1. The Need for an Annual Royalty.

Congress recognized the need for a continuing royalty by making the jukebox compulsory license fee annual -- like all fees for performing rights, whether under voluntary or compulsory licenses. There is no precedent whatsoever for the one-time fee proposed in S. 1734 by the jukebox operators to cover all performances of music. This proposal, that the total fee be paid for each jukebox in the year it is manufactured, would result in no payment whatsoever to the creators of music written and performed over that same jukebox in the later 10 or 15 years of useful life many jukeboxes enjoy -- a patently unfair result.

S. 1734 would not only overturn Congress' considered judgment that payment must be made annually. It would also abolish, for jukebox operators alone of all the many commercial interests which perform publicly, the very notion of a royalty system. The royalty system, of course, replaced patronage as the means of support for authors. It is the economic base of copyright. The basic premise of American copyright law -- indeed, every Western country's -- is that only a continuing royalty can adequately compensate creators for the continuing public performances of their copyrighted property. Jukebox operators perform copyrighted music continuously, making money from the music they perform year after year after year. They should pay license fees on a continuing basis. Indeed, creators of new music used over the extended life of the jukebox can only be compensated by a continuing royalty. A one-time "buy-out" cannot fairly compensate creators.

Moreover, the bill's abandonment of the royalty system could have far-reaching effects, creating damaging precedents for licensing other users,[2] and further denying creators reasonable compensation for the use of their property.

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[2] Indeed, in its decision to adjust the compulsory license fee for jukeboxes, the CRT held: "We find that a failure of this Tribunal to establish a reasonable fee for jukebox performance could interfere with performing rights societies receiving reasonable fees from similar users of music, whose rates are not established in accordance with statutory provisions." 46 Fed. Reg. 889.

2. The Need for Periodic Review of the License Fee.

The jukebox bill would also disrupt another key element of the compulsory license system. It would abolish the requirement of periodic review of the license fee, and freeze even the one-time license fee at $50 for new boxes[3] and only $25 (or less, depending on the age of the box) for existing boxes.[4] These amounts would remain the same for all time, no matter what the changes in economic circumstances.

The jukebox operators once before tried, and failed, to freeze the fee. In 1976, both houses of Congress overwhelmingly rejected their proposal. Congress recognized that, given changing economic circumstances, the annual fee required periodic adjustment. Congress delegated the responsibility for that periodic review (and the review of all other compulsory license fees) to the CRT, and set guidelines to govern the adjustments.

In 1975, the Senate Judiciary Committee stated that periodic adjustment of the statutory compulsory license fee was a necessity:

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[3] S. 1734 would require jukebox manufacturers, who do not perform music publicly, to pay the performing right fee rather than those who do perform the music -- the jukebox operators. This is especially troublesome because the jukebox manufacturers have, until this bill was introduced, steadfastly refused to reveal any information about their output. In the CRT proceeding, the Amusement and Music Operators Association produced a witness from one of the manufacturers who, when asked by the CRT to furnish that data, flatly refused. Other AMOA-sponsored witnesses representing manufacturers and distributors refused similar requests from copyright owners. The manufacturers have hidden the facts behind a veil of mystery.

[4] And, under the proposed bill, jukebox operators may even elect to pay this trivial sum on a quarterly basis over two years -- the munificent sum of $3.25 per calendar quarter!

> The most appropriate basis for the compulsory license is a statutory per box fee, with a mechanism for periodic review and adjustment of the per box fee. Such a mechanism is afforded by the Copyright Royalty Tribunal.

S. Rep., 96.

However, when the copyright revision bill was debated on the floor of the Senate, the jukebox operators sought an amendment to freeze the license fees, and bar periodic review. The amendment was resoundingly defeated by a vote of 60-30. Cong. Rec., February 19, 1976, S.2030-34. The bill then passed, with periodic review included, 97-0. Id. at S.2047.

In 1976, the House Judiciary Committee agreed with the Senate that periodic review was a necessity. H.Rep., 113. The bill passed the House by an equally overwhelming margin, 316-7. Cong. Rec., September 22, 1976, H.10911. The jukebox operators, however, asked that Congress set forth guidelines for such determinations, and Congress agreed. See 17 U.S.C. §801(b)(1).

3. The Need for a Reasonable Annual Fee.

Finally, the jukebox operators seek to destroy still another key element of the current license system -- the requirement that reasonable license fees be paid to copyright owners for the use of their music. Instead, the jukebox operators propose setting the license fee at a rate which would amount to less over time than the $8 rate Congress said was too low in 1976.

The initial annual per jukebox fee set by Congress in 1976 was agreed on in 1967 as a political compromise designed to ensure early passage of a revision bill. Congress set the fee at $8 for 1978, 1979 and 1980 and provided for adjustment of the fee to a reasonable level in

1980 by the CRT and periodic review of the fee every ten years thereafter.

The legislative history is explicit in stating that the $8 fee was unreasonably low. When the Senate Judiciary Committee considered repeal of the jukebox exemption as far back as 1958, it concluded that a reasonable annual per box license fee would be $19.70. (Adjusted for inflation from January, 1958 to January, 1984, that annual per box fee would be $70.25.) And, the Judiciary Committee's Report on the 1976 Act noted that, as early as 1958, it had concluded that a much higher fee than $8 was, and continued to be, warranted. It concurred in the $8 rate only to allow the bill to pass:

> This Committee in 1958 recommended an average annual per box payment of $19.70. The most recent hearings on the jukebox question did not provide any indication that the committee's decision in 1958 was unwise or the rate of payment unreasonable. In providing in this legislation for a total payment of $8 per box the committee has been greatly influenced by the desire to conform to the rate provided in the copyright legislation passed by the House of Representatives during the 90th Congress [in 1967]. Therefore, although a higher rate would be warranted, the committee has endeavored to facilitate the progress of this legislation by preserving to the extent possible in view of other provisions of this bill, the rate adopted by the House of Representatives.

S. Rep., 96-97.

The Senate Report continued by noting that the $8 annual rate was unrelated to economic reality, and that, if periodic review was not provided for, the initial fee had to be higher:

> The royalty rate of $8 per box is derived from action of the House of Representatives in 1967. That rate was adopted without the benefit of adequate analysis of the relevant economic data, and the rate has not been adjusted to

> reflect the significant inflation since 1967.
>
> This committee has accepted the $8 jukebox royalty in the expectation that it would be subject to periodic review. If such a review is to be precluded, the committee recommends that the royalty rate be now adjusted to provide a payment which is reasonable under existing conditions.

S. Rep., 99.

After the jukebox operators sought, and failed, to amend the bill in the Senate by freezing the rate, the House Judiciary Committee likewise rejected their attempt, and endorsed periodic review as the only justification for an initial $8 annual fee:

> The provisions of Chapter 8 of this legislation provide for the periodic review and adjustment of the statutory royalty rates, including those provided in Section 116. Jukebox operators have sought to have the jukebox royalty rate excluded from the review procedures of Chapter 8. This committee has accepted the $8 jukebox royalty in the expectation that it would be subject to periodic review.

H.Rep., 115.

The bill, as enacted, mandated the first review in 1980, and periodic reviews every ten years thereafter. 17 U.S.C. §804(a). The ten year interval was the jukebox operators' preference over a five year review interval: The bill reported out by the Senate Judiciary Committee in 1974, §802(b) of S. 1361, called for the CRT to review the jukebox license fee rate in 1975, 1982 and every five years thereafter. See, S. Rep. No. 93-983, 93rd Cong., 2d Sess. (1974). The copyright revision bill introduced in 1975 provided for review by the CRT at ten year intervals, at the behest of the jukebox operators. They sought the longer review intervals in the belief that ten year intervals, rather than five, would promote business stability.

Thus, the jukebox operators asked for and got the ten year periodic review they now oppose. If they truly believed they were on the skids in 1975, one would have expected the operators to have pressed for shorter, not longer, intervals for fee review. If the five year review interval had been left in place, the CRT would hear the jukebox operators' renewed argument in 1985 that a change in industry economic circumstances has occurred which warrants a downward adjustment of the statutory fee.

To sum up, having sought and obtained the compulsory license system, having sought and obtained an unreasonably low fee for the first three years of the new law, and having sought and obtained ten-year rather than five-year reviews, the jukebox operators now complain that the result -- a CRT-determined reasonable annual fee of $50, effective 1984 -- discomfits them.

They now argue that the "525% increase" in the royalty fee for coin-operated phonorecord players approved by the CRT will cause major disruptions in the jukebox business. E.g., Replay, December 1983, "Save the Jukebox." The argument, if not disingenuous, surely distorts history.

First, as we have seen, the initial $8 fee was expressly stated by Congress to have no basis in economic reality. As the Senate Report said, "a higher rate would be warranted." In a brief filed in March, 1983 in an appeal of an unrelated CRT action, the Justice Department referred to characterization of the jukebox fee adjustment in terms of a multiple of the initial statutory rate -- just the characterization the jukebox operators are making here -- as "useless if not misleading." Respondent's Br., NCTA, Inc. v. CRT, 724 F.2d 176 (D.C. Cir. 1983).

Second, the CRT made the specific finding that its adjustment of the compulsory license fee would not "have a disruptive impact on the structure of the jukebox industry or disturb generally prevailing industry practices." 46 Fed. Reg. 889. The United States Court of Appeals for the Seventh Circuit agreed. Amusement and Music Operators Association v. CRT, 676 F.2d 1144 (7th Cir. 1982). We discuss these findings in detail below.

Moreover, as we shall demonstrate below, there is no hard evidence that the coin operated machine industry was then, or is now, suffering any economic decline whatsoever. The industry is well able to pay the reasonable annual license fee set by the CRT to compensate copyright owners for the use of their property.

Finally, the fee the jukebox operators propose would make a mockery of the explicit Congressional intent that reasonable fees be paid. Assuming an unrealistically short life of only seven years for a jukebox, the one-time $50 fee, paid only for new boxes, would yield less over time than the initial $8 fee.[5] The proposed fee is arbitrary, unrelated to any economic reality, and would not adequately compensate creators for the use of their music. The jukebox industry might as well come right out with it and ask Congress for what they really long for -- a return to their pre-1978 status when they pocketed billions and paid composers nothing for the performances of their music.

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[5] A seven-year life estimate on the life of a jukebox is probably extremely cautious. Ed Blankenbeckler, President of the Seeburg Phonograph Corp., believes that at least half of the jukeboxes in operation today are "a minimum of ten years old, some a lot older." Replay, May 1984, at 48. And one of the jukebox manufacturers' representatives testified before the CRT that boxes have an average 14-year life. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 21, 1980 at 24 (testimony of Lester Rieck, sales manager of the phonograph division of Rock-Ola Manufacturing Corp.).

II. S. 1734 WOULD OVERTURN THE REASONED JUDGMENT OF A NEUTRAL EXPERT ADMINISTRATIVE AGENCY, AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

A. The 1980 Rate Adjustment.

As the law directed, in 1980 the CRT conducted proceedings, including seven days of public hearings, to adjust the compulsory license fee for jukeboxes to a reasonable level.

During the hearings, the jukebox operators, represented by their trade association the Amusement and Music Operators Association ("AMOA"), presented evidence about the economic condition of the jukebox business. They offered the testimony of jukebox operators, manufacturers and distributors. They also offered the results of a survey they prepared which Peat, Marwick, Mitchell and Co. tallied for them. It purported to show an economic picture of the industry. They argued that the $8 annual fee should be left unchanged.

The copyright owners were represented at the hearings by the performing rights organizations -- ASCAP, BMI and SESAC. ASCAP and SESAC presented data on the value of their musical property used by jukebox operators by submitting evidence on license fees for comparable uses which were negotiated in the marketplace. These fees ranged from an average of $70 to $130 annually per jukebox. BMI suggested a fee of $30 per year, which they now recognize as having been too low.

The CRT analyzed the voluminous evidence and testimony in light of the statutory guidelines, and concluded that an annual per box fee of $50 was reasonable and justified by the evidence. 46 Fed. Reg. 884 (January 5, 1981).

The CRT found that the AMOA's case did not provide reliable data:

> The Tribunal finds that the case presented by the AMOA, including the industry survey, has failed to provide reliable data concerning the operating expenses, revenues, or return on investment on jukebox operators.

Id. at 888.

After discussing the shortcomings of the AMOA survey in detail,[6] the CRT noted that other evidence in the record showed a much healthier economic picture: "We also note that the survey information is not consistent with other evidence in this record. . . ." Id.

While the CRT rejected the AMOA's data, it "found the ASCAP/SESAC concept of basing the rate on marketplace analogies to be most attractive." The CRT did not take these analogies as the final word, but merely as benchmarks which had to be adjusted:

> These analogies individually and collectively are subject to limitations and distinguishing features. We believe that certain of the distinctions set forth in the AMOA pleading have validity. While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria.

Id. (footnotes omitted).

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[6] The survey is discussed in more detail in Section III below. As noted there, the CRT also criticized the survey's "limited" response rate, questioned the survey's "methodology and objectivity", and found that the AMOA's testimony did not "create a foundation for the industry's claim of economic hardship." Id.

And, even though the CRT concluded that an annual rate of $50 was reasonable, they did not put it into effect immediately. Rather, they phased in the fee over four years in order "to ease the impact of a rate increase upon the jukebox industry." Id. at 889. Accordingly, the fee was left at $8 in 1981, set at only $25 in 1982 and 1983, and finally raised to $50 in 1984. In addition, although copyright owners had proposed annual cost-of-living adjustments, the CRT limited such an adjustment to one time only, in 1987. Id. Two of the five CRT commissioners dissented -- they would have set the fee higher: one at $60, and one at $130. Id. at 890-91.

Furthermore, the CRT held that the jukebox operators were well able to pay the fee it had set:

> We find nothing in that testimony [presented by the jukebox interests] which would warrant a conclusion that our schedule will deprive the jukebox operator of a fair income under existing economic conditions. . . . The jukebox industry pays reasonable market prices for all other goods and services they require. We hold that they can pay the schedule we have adopted for the central commodity of their boxes without adverse impact.

Id. at 889.

Having failed before the CRT, the jukebox operators appealed the CRT's decision to the United States Court of Appeals for the Seventh Circuit. However, the Seventh Circuit agreed with the CRT and held the CRT's decision "lawful in all respects."

B. The Seventh Circuit's Decision.

The Seventh Circuit upheld the compulsory license fee set by the CRT and held that the fee would not threaten the economic well-being of the jukebox industry.

The Court reviewed the CRT's decision in light of the legislative history, the statutory guidelines and the Administrative Procedure Act. It found that the evidence fully supported the CRT's decision: "After examining the voluminous record and briefs in this case, we find that the Tribunal's final rule is lawful in all respects." 676 F.2d 1146.

As for the AMOA survey, the Court was not persuaded:

> We agree with the Tribunal, however, that the conclusions of this survey should be accorded little weight. . . . If substantial weight is not accorded to the survey, AMOA is left with relatively anecdotal evidence concerning the marginal profitability of some jukeboxes and some jukebox operations.
>
> Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase. But to accept the proposition that AMOA may deprive copyright owners of increased remuneration for the exploitation of their works by showing that some jukebox operations will become unprofitable is, we believe, unsound and unjust.

_Id_. at 1154-55.

The Court also had no doubt that Congress intended the $8 annual fee to be changed:

> Since the relevant congressional committees have expressly disavowed any notion that the $8.00 fee was either reasonable or 'calculated to achieve' the goals of section 801(b) and because Congress directed the Tribunal to conduct initial proceedings determining the reasonableness of the $8.00 fee in 1980, we think the Tribunal correctly concluded that no special legislative imprimatur is attached to the $8.00 fee.

_Id_. at 1154.

And, the Court concluded that the law affirmatively supported an inflation adjustment in 1987:

> [A] cost of living or other inflation adjustment designed to maintain the real

> value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act.

Id. at 1155.

The Court then turned to the ASCAP/SESAC marketplace analogies, and also found their use fully in accord with longstanding administrative agency practice:

> We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (e.g., with respect to volume and industry structure) and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices. See, e.g. San Antonio v. United States, 631 F.2d 831, 836-37 (D.C. Cir. 1980), clarified, 655 F.2d 1341 (D.C. Cir. 1981); Burlington Northern, Inc. v. United States, 555 F.2d 637, 641-43 (8th Cir. 1977). Moreover, we believe that ASCAP/SESAC presented the most credible and relevant evidence before the Tribunal. The arguably analogous musical fees provide substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark.

Id. at 1157.

Accordingly, the Court affirmed the CRT's decision:

> Ratemaking is an art, not a science. We believe that the Tribunal did not act either unreasonably or unlawfully by establishing a $50.00 royalty fee which would be implemented in stages and be subject to future inflationary adjustments. . . . In summary, we find no fault with the Tribunal's final rule as promulgated.

Id. at 1159.

The AMOA petitioned the Supreme Court for review. The Court denied certiorari. 459 U.S. 907 (1982).

Having failed before the CRT, the Seventh Circuit and the Supreme Court, the jukebox operators now seek to overturn that result through legislation.[7] However, as we shall now show, none of the justifications offered by the jukebox interests for S. 1734 is sound.

III. NONE OF THE JUSTIFICATIONS OFFERED BY THE JUKEBOX INTERESTS IN SUPPORT OF S. 1734 IS VALID.

A. The Jukebox Operators Have Repeatedly Tried and Failed to Prove Economic Hardship.

Jukebox operators have maintained for decades that they are in danger of "going broke." They have been running one of the longest "going-out-of-business" operations in history.

In support of S. 1734, the jukebox operators have now entered still another plea of poverty. However, the industry's latest plea of poverty, like its previous claims, is without merit. At the outset, it must be recognized that a true and complete economic picture of the coin machine industry has never emerged.[8] The cash receipts from these businesses -- like other cash businesses which make up the "underground economy" -- are seldom reported accurately.

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[7] Interestingly, in all their arguments for S. 1734, the AMOA's only comment on the Seventh Circuit's decision attributes the result to the "wide discretion" afforded administrative agencies. They fail to mention the real bases for the court's decision: the jukebox operators presented no credible evidence to support a continued $8 annual fee; the copyright owners, on the other hand, did present credible evidence which ultimately justified a $50 annual fee as reasonable and in conformity with the four statutory criteria of 17 U.S.C. §801(b)(1).

In addition, the track record of economic surveys of jukebox operators is uniformly poor -- such surveys have been and continue to be notoriously biased and unreliable. The results of such jukebox-operator-conducted surveys in 1952, 1958, 1967 and 1980 were severely criticized and skeptically received by Congress, the CRT and the court. The AMOA's latest effort, their 1983 Cost of Doing Business Survey, is equally unreliable and should be given no weight.

Moreover, the testimony and other evidence presented by jukebox operators and manufacturers before Congress have always been fraught with internal inconsistencies and contradicted by other operators, manufacturers and trade publications.

1. General Health Of The Jukebox Industry

Before focusing with particularity on the surveys and other economic data presented to Congress and the courts by jukebox operators, it is useful to highlight the statements that have been made about the general economic condition of the jukebox business over the years. These statements by the trade press, the Register of Copyrights, Congressmen and jukebox operators indicate that, despite their continual cry of poverty, jukebox operators have been well able to pay for the performing right in music from the day the first jukebox was invented, and can do so today.

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[8] Jukebox operators also deal in video games, pinball machines, cigarette and food vending machines, and other coin-operated devices. Thus, there is no true "jukebox industry", but rather a coin machine industry with many lines of business. The product lines are interrelated -- a jukebox, for example, will build traffic for a pinball or vending machine. *E.g.*, Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 4, 1980 at 10 (testimony of John Scarbrough, manager of the AMOA's 1980 survey.).

For example, in 1951, the industry trade paper *Cashbox* reported that "not like other divisions of the entertainment industries, the automatic music business has continued to grow and to expand where, today, there are over 550,000 jukeboxes in existence. . . ." *Cashbox*, September 29, 1951, at 4.

In 1952, Arthur Fisher, then Register of Copyrights, testified before the House Committee on the Judiciary that the "industry could make the same adjustments here [that is, pay for the performing right in music] as they have made them to the [other] increased costs . . . and that they would still operate successfully after such adjustments." Hearings on H.R. 5473 before Subcommittee No. 2 of the House Committee on the Judiciary, 82nd Cong., 2d Sess. 377 (1952).

Six years later, in 1958, the Senate Committee on the Judiciary reported favorably on a bill to repeal the 1909 law's exemption. The Senate report stated that the repeal of the exemption would not seriously injure the jukebox business:

> The hearings disclose that the answer to this question is in the negative. . . . [I]t appears that the jukebox industry is a growing business and has been able to absorb the increased price of the machine itself. The operators of jukeboxes have expressed the fear that additional costs to their operations in the way of royalties would seriously impair, if not destroy, the business. The committee does not believe this to be a basically sound argument, in the light of all of the testimony, as will appear further in this report.

S. Rep. No. 2414, 85th Cong., 2d Sess. 10 (1958).

One year later, in a statement before the House

Judiciary Committee, Congressman Celler made the following observations about the economic condition of the industry:

> Despite the fact that their 'can't pay' argument -- like their other arguments -- has been answered definitively, the operators expect again to plead poverty before this subcommittee. . . . [T]he jukebox interests fall back on a final plea of poverty -- despite the fact that impartial testimony reveals that they are well able to pay.

Hearings on H.R. 5921 before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess. 8-9 (1959).

And, the national President of the jukebox trade association (then named the Music Operators of America), James F. Tolisano, testified about the health of the industry in 1967 before a Senate subcommittee: "Frankly, I believe that our industry, with its diversified operations, is on the upswing . . . an improved trend seems to be in effect . . . [and] the future outlook for our industry appears to be good. . . ." Hearings on S. 597 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 239 (1967).

The jukebox operators now base their argument on a false assumption. They say that "the continued economic disruption to the coin-operated phonorecord player industry should be minimized." But, there is no evidence that there is any "economic disruption." In fact, both the CRT and the Seventh Circuit found that the adjustment to the compulsory license fee would not cause any disruption of the jukebox industry. The CRT held:

> We find nothing in that testimony [presented by the jukebox industry] which would warrant a conclusion that our schedule will deprive the jukebox opera-

> tor of a fair income under existing economic conditions.
>
> We cannot on the basis of the evidence presented by the jukebox industry find that our schedule will have a disruptive impact on the structure of the jukebox industry or disturb generally prevailing industry practices. . . .[9] The jukebox industry pays reasonable market prices for all other goods and services they require. We hold that they can pay the schedule we have adopted for the central commodity of their boxes without adverse impact.

46 Fed. Reg. 889.

The Seventh Circuit agreed with the CRT and found that payment of the compulsory license fee determined by the CRT to be appropriate would not threaten the economic well-being of the jukebox industry.

The jukebox operators' current claims of poor economic health are contradicted by many reports in their own trade press -- including many statements by the very spokesmen urging the adoption of S. 1734.

Recently, after S. 1734 was introduced, the jukebox trade publication Play Meter reported on its interview with the President of the AMOA, Wes Lawson, stating that Lawson "relied on the steady income and durability of the jukebox before and during the video boom", and that he called the jukebox "the backbone of the industry". Play Meter, October 1, 1983, at 33-34. Play Meter also interviewed representatives of the five major jukebox manufacturing companies and reported that all agree that jukebox sales are up and that the future looks bright for even more sales. Play Meter, April 15, 1984, "The Bear Wakes Up". The President of Seeburg Phonograph Corp., Ed Blankenbeckler, reported that "there is a hot market for jukeboxes right now." Replay, May 1984, "Going Back to Basics". Jukebox distributor Lou Singer reported: "I think that this is the best year for the phonograph manufacturers in ten years or more. People like Rowe are operating at capacity and selling all their phonographs". Replay, May 1984, "Lou Singer -- Trade Conditions Then and Now".

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[9] The CRT found this criterion applicable to creators and copyright owners as well as the jukebox operators and also found that an unreasonably low fee would have a negative impact on the licensing of other industries by copyright owners. 46 Fed. Reg. 889.

We now turn to a discussion of the economic surveys relied on by jukebox operators over the years to support their claims of economic hardship. As we shall demonstrate, those surveys, including the most recent AMOA 1983 Cost of Doing Business Survey, are entitled to no weight.

2. The Economic Surveys Of Jukebox Operators.

The bulk of the data jukebox operators have relied on over the last thirty years before Congress and the CRT to support their claims of economic hardship consists of the results of five economic surveys of jukebox operators. The results of the first three surveys, made by Price, Waterhouse & Co. in 1952, 1959 and 1967 at the behest of jukebox manufacturers, were presented to Congress in the course of committee hearings on the repeal of the 1909 exemption. The fourth, conducted by the AMOA through Peat, Marwick, Mitchell & Co. in 1980, was presented to the CRT during hearings on an adjustment to the jukebox compulsory license fee. The questions addressed by the first three surveys were identical, and the fourth survey was based on the three prior surveys and used essentially the same questions and procedures. The results of each of the surveys were self-serving, unreliable and severely criticized by those to whom they were submitted. The fifth and latest survey is the AMOA's 1983 Cost of Doing Business Survey. It asks many of the same questions used in the 1980 survey and is equally flawed.

a. The Price, Waterhouse Surveys.

Theodore Herz of Price, Waterhouse & Co. presented the conclusions of the first survey to the House Committee on the Judiciary in 1952. Congressman Celler criticized the survey because Herz made no "spot checks" to determine the accuracy of the responses. And, Herz agreed that the operators might have responded "according to their own self-interest." Hearings on H.R. 5473 before Subcommittee No. 2 of the House Committee on the Judiciary, 82nd Cong., 2d Sess. 139 (1952).

Congressmen Celler and Harris further denounced the survey for its failure to ask jukebox operators to itemize their expenses. Congressman Celler stated: "I would say the questionnaire is grievously at fault because if these expenses are not itemized, we do not know what they are. I think the whole questionnaire is valueless." Equally critical of the survey, Congressman Harris remarked: "It seems to me that the components of expense are basic to the significance of the survey." Id. at 141. Congressman Celler addressed the Subcommittee further on February 6, 1952:

> Now it is rather strange and anomalous that Price, Waterhouse simply accepts the answers to questions on expenses without going behind those conclusions to determine how those conclusions as to expenses were arrived at. And I think, therefore, this pile of questionnaires and answers that were given to the committee are simply self-serving declarations and I think, without minute scrutiny of each one, are not of too great a degree of

> value for enlightenment of the committee. And any kind of figures that are based upon such questionnaires and such answers are not of too great a degree of value to this committee.

Id. at 200-01.

Hammond E. Chaffetz, attorney for the Automatic Phonograph Manufacturers, also pointed out the discrepancies in the survey results: "It may be that one man included some expenses he should not and maybe another man did not include some expenses he might have." Id. at 142.

However, despite this sharp Congressional criticism of the survey and the industry's own recognition of the survey's inadequacies, jukebox manufacturers again forwarded exactly the same questionnaire to jukebox operators in 1958.

Before the results of this second survey were presented to the House Subcommittee in 1959, Congressman Celler reminded the Subcommittee of the problems inherent in the prior survey:

> Past experience indicates that only a small percentage of the operators will fill out and return such questionnaires, and that the auditing firm receiving them will merely tabulate such replies as are received, without attempting to verify them for accuracy and completeness.
>
> I should like to suggest, Mr. Chairman, that your committee examine with care any conclusions based on these self-serving questionnaires, and that it diligently seek to have laid before it the actual economics of the jukebox industry, concerning which, as the Register of Copyrights stated, it is very difficult to get precise figures.

Hearings on H.R. 5921 before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess. 8-9 (1959).

Again, Theodore Herz of Price, Waterhouse & Co. presented the results of the second survey. He confirmed that "[t]he questionnaire used and the procedures followed. . . were the same in all material respects as those previously used in the survey made in 1952. . . ." Id. at 227. Herz also told the Subcommittee that no "spot checks" had been made, and that Price, Waterhouse, again, had relied solely on operator responses. Id. at 227 and 236. Finally, Herz admitted that the questions presented a "hazard that they will be misunderstood [by the operators]." Id. at 237.

Committee counsel, Cy Brickfield, went on to discuss the ambiguity present in four out of the five questions used in the survey. Brickfield pointed out, and Herz agreed, that in response to question one,[10] which asked the jukebox operator to state the number of jukeboxes he operated, the operator might have reported only the jukeboxes recorded in his name and not those in the names of other family members.

Question two[11] asked the operator to report his share of the total collections for 1958. However, Brickfield noted that the question did not explain whether the operator was to report his "total take" or merely his receipts after making certain deductions, such as taxes and guarantees.

Question three[12] asked the operator to state his total expenses for 1958 in connection with the jukebox business, without itemization. Brickfield pointed out that operators might have included, by mistake, expenses incurred in other phases of the operator's coin machine business.[13]

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[10] 1. How many jukeboxes do you operate?

[11] 2. What was your share of the total collection in 1958 after paying the location owners their share?

[12] 3. What were your total expenses in connection with your jukebox business in 1958? Do not include your own salary. Do not include income taxes, Federal or State.

This is a crucial mistake. To this day, jukebox operators do not separate jukebox revenues and expenses from other machine receipts and costs. In testifying before the CRT in 1980, coin machine operator and AMOA officer (later AMOA President), Leoma Ballard, confirmed that jukebox expenses were inseparable from other amusement game expenses since the proceeds from jukeboxes and other machines were not segregated. Ballard further testified that, like most operators, she did not maintain separate income records for her jukeboxes. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 4, 1980, at 130-31.

Finally, as to question four,[14] Brickfield remarked that some operators might not have properly apportioned the value of their equipment between the jukebox phase of the business and the other coin machines they operated. He also criticized question four because "value" could mean present value, resale value or purchase value. Id. at 236-39. The questionnaire did not explain what "value" meant for purposes of the survey.

Not in the least abashed by Congressional criticism, the jukebox operators conducted the very same survey again, in 1966. Price, Waterhouse did not redraft any of the questions. It did not clarify or explain any of the questions to the operator. It did not ask the operator to itemize expenses. No spot checks were made to determine the veracity of the responses.

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[13] A further problem with the survey became apparent a few years later in 1965, when William Cannon, Vice President of the Music Operators of America, testified before the House Subcommittee that "jukebox expenses are inseparable from amusement game expenses. . . ." Hearings on H.R. 4347 before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 564 (1965).

[14] 4. What is the value of the jukeboxes, records, trucks, automobiles, and other equipment used in your jukebox business?

b. The AMOA's 1980 Survey.

In 1980, the same thoroughly discredited Price, Waterhouse surveys became the basis for yet another survey of jukebox operators conducted by the AMOA through Peat, Marwick, Mitchell & Co., to be used in CRT proceedings to adjust the jukebox compulsory license fee to a reasonable level.

Remarkably, the AMOA ignored the CRT's express request to be consulted about the content and structure of any survey questionnaire. Specifically, on February 4, 1980, the CRT scheduled a pre-hearing conference to be held on February 13, 1980, for the purpose of providing suggestions to the parties regarding any survey that might be made. At the conference, the AMOA announced that its questionnaire had already been completed and, probably, mailed. But later, on April 4, 1980, Peat, Marwick's manager in charge of the survey, John Scarbrough, testified before the CRT that his firm had the capability of changing and mailing the survey overnight. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 4, 1980, at 31-32. And, in fact, the survey had not been mailed on February 13 -- it was not mailed until February 15, 1980, two days after the CRT's conference.

Moreover, as if to emphasize that the AMOA's disdain for Congressional guidance extended to the CRT, Don Van Brackel, director and past President of the AMOA, told the CRT that even if there had been additional time, the AMOA would not have changed its questionnaire. Id., April 3, 1980, at 36. Thus, despite the obvious inadequacies of the AMOA's prior surveys and the CRT's expressed desire to be consulted about the AMOA's 1980 survey, the AMOA refused to cooperate with the CRT in the CRT's effort to obtain accurate data.

Again, the 1980 survey failed to include questions about the vending machine aspects of the coin machine business, although Mr. Van Brackel testified that he knew that other industry surveys had asked for such data. Id. at 51-52. And, Dr. Scarbrough testified that if vending machines were a significant part of the operator's revenue, the survey questions would be "significantly affected" along with Peat, Marwick's conclusions about the profitability of jukeboxes. Id. at 93.

Dr. Scarbrough also testified that his firm could not attest to the validity of the financial information acquired from the survey, Id., April 4, 1980, at 14, and that his firm had not conducted any follow-up surveys to determine whether they had received a representative sample. Id. at 54.

In light of this testimony, it is not surprising that the CRT found that the survey did not provide "reliable data concerning the operating expenses, revenues, or return on investment on jukebox operators." 46 Fed. Reg. 888. The CRT also noted the limited response to the survey, and relied on Dr. Scarbrough's own testimony that, "I wouldn't argue very hard if you wanted to say that it was not a good response." Id. The CRT found that the survey's objectivity and methodology were placed in real doubt by record evidence. The survey results were inconsistent with other evidence in the record, in particular, the results of trade magazine surveys: one by Play Meter in 1979 and one by Replay in 1978. Id.

When the jukebox operators appealed the CRT's decision to the United States Court of Appeals for the Seventh Circuit, the Court agreed with the CRT "that the conclusions of this survey should be accorded little weight." 676 F.2d at 1154.

c. The AMOA's 1983 Cost of Doing Business Survey.

The AMOA's latest effort to prove that it is in extremis, its 1983 Cost of Doing Business Survey, suffers from some of the very same fatal flaws as the AMOA's four prior efforts. Indeed, as Dr. James Gaertner, the Notre Dame professor who directed the survey, stated in his report to the AMOA on the results of the survey: "[A]ny attempt to draw broad far-reaching generalizations from the findings of this survey must be done with some caution." 1983 Cost of Doing Business Survey and Report, at 18. Despite this warning, the AMOA has thrown caution aside and now professes to find hard evidence in the survey, where there simply is none.

Like the prior surveys, the response rate to the 1983 survey was again very low. Dr. Gaertner noted in his report that the response rate "was less than hoped for," and down by 2.6% from a previous AMOA survey done in 1981. Id. Only 93, or a mere 14.5 percent, of the 641 AMOA members selected for the survey provided "usable" responses to the questionnaire. No explanation was given of what constituted a "usable" response.

And, of the 93 so-called usable responses, some operators failed to complete the questionnaire. Indeed, the most relevant information to the jukebox industry's claim of poverty, the per jukebox revenue figures, generated only 33 responses from the 641 operators surveyed. One industry publication reported the number of operators at 11,000 in 1983 with a likely rise to 12,000 in 1984. Play Meter, November 1, 1983, at 42, 54. And yet, the industry argues that only 33 self-selected responses to questions put to only 641 AMOA-selected operators concerning jukebox revenues proves poverty.[15]

In addition, there is no evidence that the responses of the 33 operators are representative of the more than 10,000 operators in business. These results are called into question since certain operators are less likely to have responded to the survey than others, resulting in a "self-selection bias." Operators deriving large cash revenues from their jukebox operations may have been less likely to provide what Dr. Gaertner himself refers to as "sensitive financial information." Thus, the survey results on jukebox revenues and operator profits may indeed be far too low. And, like the previous surveys, no "spot checks" were made to determine the accuracy of the responses received.

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[15] The AMOA uses statistics to suit its convenience. Here, 33 self-selected operators constitute an adequate sample. Yet, during the CRT hearings in 1980, the AMOA argued against admission of the results of The Mirage study on municipal corruption done by the Better Government Association and the Chicago Sun-Times. There, it was found that 18 out of 22 Chicago jukebox operators reportedly offered some form of illegal inducement such as a loan to the owners of a tavern to take their jukebox. The industry argued that so few operators were not representative of the industry as a whole, even though they represented about half of the jukeboxes licensed in Chicago in 1977. See generally Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, May 19, 1980.

Moreover, like the 1980 survey, no information is given on how the AMOA selected the 641 operators, out of a membership of over 2,000, to be surveyed.[16]

Like the 1980 survey, the 1983 survey is hopelessly biased.[17] Dr. Gaertner's cover letter transmitting the AMOA questionnaire may well have invited inaccurate responses. Dr. Gaertner informed operators that the survey results "will continue to prove beneficial . . . in such procedures as future legislative hearings". 1983 Cost of Doing Business Survey and Report, Appendix A. In view of the jukebox trade press reports on this bill and the AMOA's massive efforts to secure its passage, there can be no real doubt that the AMOA operators to whom the questionnaire was mailed knew that "the legislative hearings" referred to were those on S. 1734 and H.R. 3858.

Finally, the survey asked operators to report their annual revenues from jukebox and other coin machine operations after deduction of commissions and sales taxes. However, these figures represent only the operators' revenues and profits and ignore the share paid to location owners. The profit picture also ignores the often generous salaries and benefits paid to operators and their families.

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[16] During the 1980 hearings before the CRT, Don Van Brackel, jukebox operator and former President of the AMOA, testified that the AMOA did not know how Replay had compiled the mailing list for the 1980 survey. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 3, 1980, at 44-45.

[17] The 1980 questionnaire was accompanied by a letter advising that the survey was not an AMOA survey, but rather an independent survey. However, the letter was printed on AMOA letterhead and was enclosed in a envelope with the AMOA return address. In addition, in its February 1980 newsletter, Replay advised operators that the questionnaires would be presented to the AMOA for use in the 1980 CRT proceedings.

And, as the AMOA testified before the CRT, jukeboxes are often "loss leaders", building traffic for other coin-operated machines. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 14, 1980, at 10 (testimony of John Scarbrough, manager of 1980 survey); April 4, 1980 at 124 (testimony of Leoma Ballard, jukebox operator and AMOA officer); and, April 21, 1980 at 9 (testimony of jukebox operator Jimmy Watkins). Thus, the profitability of jukeboxes to operators lies not only in the cash the jukeboxes take in, but also in the cash put into other machines by patrons attracted to the locations by music.

The results of the 1983 AMOA survey, like those of its previous surveys, cannot be credited. They provide unreliable, biased and insufficient data on the economic state of the jukebox business.

3. Three Indicia Showing That Jukebox Operators Can Afford Current Copyright Fees.

Whether some jukebox operators can or cannot afford to pay for the musical property they want to use should not be the determinant of the value of that property. But three indicia show that they can readily afford to pay the modest fees involved. We discuss below the split of revenue between the jukebox operator and the location owner,[18] the diversified nature of the coin-machine industry of which jukeboxes are only one part, and the operators' revenue.

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[18] The location owner is the proprietor of the establishment where the jukebox is located.

a. Split of Revenue.

Over the past forty years, the jukebox spokesmen have asserted that the jukebox operator and location owner generally split jukebox revenues on a 50/50 basis.[19] The operators have often increased their share of the split -- many operators use a 60/40 ratio.

The CRT found that the 50/50 split is an overlooked but extremely important aspect of the jukebox business. Whatever the operators' profits are, the 50% of jukebox revenues given to the location owners by the operators represents pure profit, earned by using the musical property of copyright owners. No valid economic study can ignore this profit derived from the license obtained by the operators for themselves and for their location owners. The AMOA studies do not accurately describe the market they purport to describe -- they fail entirely to deal with the most profitable part of the market.

Further, the basis for the jukebox operators' claim that they cannot pay the increased compulsory license fee is the assumption that they pay it all. This is simply not true by their own admission. The operators have always, as a standard business practice, taken the amounts of license fees and taxes "off the top" of each machine's revenues. That is, half of such fees -- including half of the compulsory license fees -- have come from the location owners' share of jukebox receipts.[20]

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[19] See, e.g., Hearings on H.R. 1269, 1270 and 2570 before the Subcommittee on Patents, Trademarks, and Copyrights of the House Subcommittee on the Judiciary, 88th Cong., 1st Sess. 99 (1947) (statement of Sidney H. Levine, attorney for Automatic Music Operators Association, Inc.); Hearings on H.R. 5473 before Subcommittee No. 2 of the House Committee on the Judiciary, 82nd Cong., 2d Sess. 120 (1952) (statement of Hammond E. Chaffetz, attorney for jukebox manufacturers); Hearings on H.R. 5921 before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess. 171 (1959) (statement of Jack R. Clanton, attorney for Music Operators of Virginia); Hearings on S. 597 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 239 (1967) (testimony of James F. Tolisano, President of the Music Operators of America); and results of the Peat, Marwick, Mitchell & Co. survey of 1980.

Russell Mawdsley, a coin machine operator and past President of the AMOA, testified before the CRT that operators took license fees "off the top" before splitting revenues with the location owner. In fact, Mawdsley told the CRT that he probably wouldn't do business with the location otherwise. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 21, 1980, at 139. Don Van Brackel also told the CRT that "taxes", "licenses, copyright fees, [and] things of that nature" came off the top before revenues were split with the location owner, and that his business had always operated in that manner. Id., April 22, 1980, at 98-99.

None of the previous AMOA surveys recognized this basic fact of the jukebox business, and the 1983 survey continues this fundamental error. The survey asked operators to report their annual receipts and then deduct expenses and income taxes to reach the operator's net profit or loss. It appears that the operator's figure for annual receipts represents his revenue after the split with the location owner. The 1983 survey results seem to have been reached on the false assumption that taxes and license fees are paid by operators in their entirety, after, rather than before, the split. If our understanding of the AMOA's study is correct, there is a double deduction of these expenses, thereby understating the operator's profit, particularly in places with substantial local and state taxes on jukeboxes.

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[20] See, e.g., testimony of James Donovan, representative of the National Licensed Beverage Association (NLBA), Hearings on H.R. 5473 before Subcommittee No. 2 of the House Committee of the Judiciary, 82nd Cong., 2d Sess. 182 (1952); testimony of Andrew Ziomek, Vice President of the NLBA, Hearings on H.R. 5921 before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess. 176 (1959); testimony of Sanford Bomstein of the NLBA, Hearings on H.R. 4347 before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 652 (1965); testimony of Robert E. Nims, jukebox operator and representative of the National Small Business Association, later President of the AMOA. Id. at 655.

Indeed, local and state taxes on jukeboxes, paid by jukebox operators, are frequently more than the $50 annual compulsory license fee. For example, the city of Tucson charges an annual license fee of $150 per jukebox. Operators in Berkeley, California, pay an annual business license of $100 per jukebox. The city of Philadelphia imposes a mechanical amusement device tax on jukebox operators of $100 per jukebox annually. Baltimore County, Maryland, charges $100 per jukebox annually. And, the State of Tennessee's jukebox and amusement device fee is $100 annually per jukebox.

And finally, the jukebox business is flexible and is finding ways of meeting changed conditions. For example, increasingly, jukebox operators are obtaining weekly minimum guarantees from location owners for each jukebox: A 1979 survey of operators by Play Meter, revealed that 30% of the operators were successful in negotiating weekly minimum guarantees ranging from $13 to $45 per week for each jukebox, with the most common minimum being $25. Replay's recent straw poll of operators disclosed that some operators received weekly minimum guarantees ranging from $30 to $60. Replay, June 1, 1984 at 72.

b. Diversification of the Coin Machine Industry.

There is no "jukebox industry." Rather, there is a coin machine industry, with jukeboxes as one business line in that industry. In addition to jukeboxes, the industry includes vending machines, pinball machines and video games. This is relevant in two respects: First, while the industry has admitted the diversified nature of its business operations, its economic surveys of jukebox operators have consistently purported to include statistics on jukeboxes only, or have subjectively separated financial information for jukeboxes from other machines, with no explanation of the accounting principles involved in such a separation. Yet, as we have seen, there is no way to get valid revenue and expense figures for jukeboxes only, because the common industry practice is to lump jukebox and other machine revenues together, and because many costs apply to more lines of business than just jukeboxes. The result is that each survey has been flawed.

Second, there is a symbiosis between the lines of businesses run by jukebox operators. Jukeboxes build traffic for games and vending machines. Their value to operators is measured not merely by the money put into the jukebox coin slot, but in the money deposited in all the other machines at the same location -- cigarette vending machines, pinball games, and the like.

The diversified nature of this industry is well-established. For example, in 1959, Jack R. Clanton, attorney for the Music Operators of Virginia, testified:

> Today, it is rare to find one who operates exclusively in music. The tremendous overall increase in operational expenses, coupled with the disproportionate increase in income, has forced almost all of our operators in Virginia

> into operation of allied equipment such as cigarette machines and chewing gum vendors.

ings on H.R. 5921 before Subcommittee No. 3 of the House ittee on the Judiciary, 86th Cong., 1st Sess. 170).[21]

That same year, the House Subcommittee examined ts of a 1954 Census Report on coin-operated amusement devices. The Report stated: "Coin-operated amusement device businesses consist of establishments primarily engaged in operating coin-operated machines such as jukeboxes, pinball games, slot machines (where legal) and other similar coin-operated amusement machines." _Id_. at 182.[22] George A. Miller, then President of the Music Operators of America, also testified about the "diversified" nature of the jukebox business. _Id_. at 224.

Moreover, James Tolisano, a later President of the Music Operators of America, spoke extensively about the diversification of the jukebox business in 1967:

> The process of 'diversification' by which music operators generally have broadened their operations to include other coin-operated amusement and vending machines, has continued, and these other

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[21] Given the substantially unreported cash receipts flowing into these machines, the notion that operators were "forced" to expand into games and vending machines is dubious. More likely, they saw another cash cow they could milk. Such dissembling is common on this point -- at the CRT hearings, a Chicago jukebox operator, John Strong, claimed that he had not added amusement devices (_i.e._, pinball machines) to his jukebox operations until 1977, when his jukebox business was "falling off." In fact, one of the Tribunal Commissioners discovered the real reason during her questioning of him: pinball machines were not legalized in Chicago until 1977. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, April 4, 1980, at 54, 57.

[22] Video games are the latest addition to this list.

> machines now constitute the major part of most operators' equipment and operations. This diversification process has contributed to some noticeable improvement in the past year or two in the overall economic outlook for our industry.

Hearings on S. 597 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 239 (1967).

Nevertheless, the jukebox operators have insisted on presenting "statistics" as if they related only to the operation of jukeboxes and not to the coin-machine industry as a whole. The 1952, 1959, 1967 and 1980 economic surveys of jukebox operators asked operators to provide information only about their jukebox operations, despite the fact that jukebox industry personnel were simultaneously testifying about the diversified nature of the industry and, in effect, the impossibility of supplying information on jukeboxes alone.

In fact, the AMOA's 1978, 1981 and 1983 Cost of Doing Business Surveys recognized the diversified nature of the coin machine industry, but, nevertheless, purported to examine the economic condition of only the jukebox business. Play Meter's 1979 survey reported that "for the first time, there wasn't a single operator who reported that he handled jukeboxes alone". Play Meter, November 1979, at 22. The AMOA 1983 Cost of Doing Business Survey also reports no operators running jukeboxes only.

Since expenses are shared among all these lines of business by the operators, their post-hoc segregation of expenses for legislative survey purposes is highly suspect. And the role of any "unprofitable" jukeboxes as "loss leaders," described above, is ignored. Thus, the surveys presented to Congress and the CRT were obviously, and unreasonably, limited in scope, thereby distorting the true economic picture of the coin machine industry.

c. Revenue of Jukebox Operators

The revenue claims of the AMOA do not jibe with other industry figures. Putting these figures on the same basis in tabular form shows the following:

Year	Annualized Operator Revenue	Annualized Gross Revenue	Source
1950	$644	$1,288	AMOA[23]
1958	880	1,760	AMOA[24]
1966	894	1,788	AMOA[25]
1977	-	2,392	Play Meter[26]
1978	-	2,704	Play Meter[26]
1978	754	1,508	AMOA (Replay)[27]
1979	-	2,806	Play Meter[26]
1980	-	2,600	Play Meter[26]
1980	754	1,508	AMOA[28]
1981	-	2,860	Play Meter[26]
1982	-	2,652	Play Meter[26]
1983	-	2,600	Play Meter[26]
1983	916	1,832	AMOA[29]
1983	-	2,431	Replay[30]
1983	-	2,366	Replay[30]
1984	-	2,223	Replay[31]

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[23] Hearings on H.R. 5473 before Subcommittee No. 2 of the House Committee on the Judiciary, 82nd Cong., 2d Sess. 136 (1952).

[24] Hearings on H.R. 5921 before Subcommittee No. 3 of the House Committee on the Judiciary, 86th Cong., 1st Sess. 8-9 (1959).

[25] Hearings on S. 597 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 239 (1967).

[26] Play Meter, November 1, 1983.

[27] Replay, AMOA "Cost of Doing Business Survey," May 1979.

[28] Jukebox Royalty Fees Proceedings, AMOA Exhibit 10.

[29] 1983 Cost of Doing Business Survey and Report.

[30] Replay, "Operator Poll," April, 1984.

[31] Replay, "Straw Poll," June, 1984.

The AMOA's claim that 1983 gross revenues averaged $1,832 per jukebox is far less than Replay's 1983 figure of $2,431, or Play Meter's figure of $2,600. We believe there are no accurate figures, in part because of the severe methodological defects of all these surveys, and in part because true reports of all-cash businesses' revenues are rare.

The AMOA's claim that jukebox revenues are declining and that the industry is suffering economic hardship also does not square with the fact that operators continue to purchase jukeboxes in substantial numbers. Replay reports that 26% of operators bought more jukeboxes in 1983 than 1982. Replay, November 1983. Replay also reports that jukeboxes came in second in terms of the kinds of machines operators intend to purchase in 1984 as compared with 1983. Replay, April 1984. Replay's recent straw poll of operators revealed that half of those polled intend to purchase more jukeboxes this year than last. Replay, June 1984, at 72. And, the major jukebox manufacturers also report that jukebox sales are up. Play Meter, April 15, 1984.

Furthermore, the potential for profit in 1984 also looks promising. Play Meter recently predicted that: "The two most solid staples of the industry, the pool table and the phonograph, are expected to continue to surge along in '84 with potential for a moderate increase in earnings as operators concentrate more on their adult locations." Play Meter, November 1, 1983, at 54.

B. Jukebox Operators Do Not Compensate Copyright Owners for the Performing Right in Their Music by Payment of Mechanical Royalties.

Over the years, jukebox operators have argued that they pay millions of dollars to copyright owners in the form of mechanical royalties, and thus already adequately compensated copyright owners for the use of their music. They make the same argument in support of S. 1734.

The argument is specious. The mechanical royalty, paid by a record company to record copyrighted music and distribute the recording, does not compensate copyright owners for the public performance of their works. And, the mechanical royalty is paid by the record company, not by the jukebox operator.

The jukebox operators have continually sought to create confusion by referring to these two separate rights, covering two different uses of copyrighted property, as if the two were one and the same. The truth of the matter was succinctly stated by Robert E. Dolan, a member of the Composers and Lyricist Guild, before the Senate in 1967:

> It is the record companies that make these payments, not the jukebox operators. We can't have everybody claiming it as a deduction. . . [E]xtending the MOA reasoning, we could say that everybody in the world -- including my children -- who buys a record, pays that 2¢ a side. The difference is that while my children take the record home and play it for their own enjoyment, the jukebox operators go into business with it.

Hearings on S.597 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 893 (1967).

The jukebox operators used this same argument before the CRT during the proceedings on the 1980 rate adjustment. The CRT specifically rejected it:

> We reject the contention that copyright owners are paid for jukebox performances by mechanical royalties derived from record sales. We recognize that performing rights are distinct from recording rights. The Congress has determined that copyright owners are entitled to be paid reasonable fees for both.

46 Fed. Reg. 889.

Congress and the CRT have concluded that mechanical license fees do not compensate copyright owners for the public performances of their works on which jukebox operators and location owners make money.

C. The Compliance Issue is a Red Herring.

In support of S. 1734, the jukebox operators maintain that "compliance with the existing law is difficult and time-consuming." Replay, December 1983, "Save the Jukebox." Jukebox operators further argue that, because compliance is so low, there is a need "for a more easily enforceable, simpler and equitable law." Id. But compliance is administratively simple and illegal behavior should not be rewarded.

The statutory compulsory license system is supposed to work this way. In January of each year, each operator files an application with the Licensing Division of the Copyright Office, identifying the jukeboxes for which licenses are sought, and enclosing the requisite payment of license fees. The Copyright Office then forwards a certificate for each machine which must be affixed to the jukebox. 17 U.S.C. §116 (1976). Once registration for the first year has been made, the Copyright Office sends simple annual renewal forms to the operator which give all the information needed to renew the registrations.

In spite of this simple procedure, many operators failed to comply with the law, even when the fee was only $8. No one knows precisely how many jukeboxes are in use. But, from a comparison of the estimates with the number of boxes registered with the Copyright Office, it is likely that from half to two-thirds of the jukeboxes in the country are run by operators who have not complied with the law. In many cases, the failure to comply is willful. Yet, the operators would have their illegal behavior rewarded by easing the already simple compliance procedures. And, their proposal would further reward illegal behavior by granting a general amnesty -- exempting past noncompliance from infringement liability.

If Congress were to help with the so-called compliance problem, it could do so by putting more teeth in the law -- for example, by creating a presumption that each record in a jukebox was performed, so as to reduce the time, trouble and expense involved in preparing infringement cases, or, by encouraging the Justice Department to institute criminal proceedings in appropriate cases.

Rather than help compliance, S. 1734 might well substitute a new form of noncompliance by the manufacturers, who have always refused to publish information about their output.

The promise of greater compliance should be seen for what it is: a transparent device to deprive songwriters of their just due.

D. S. 1734 Would Not Help Administration and Enforcement of the Compulsory License.

Jukebox operators assert that the present law is difficult to administer and to enforce, and that S. 1734 would help. Their claim is not supported by the facts.

The Licensing Division of the Copyright Office effectively administers the compulsory license. The cost of the administration does not come out of taxpayers' pockets. Rather, it is assessed against copyright owners. It is strange that the jukebox operators are complaining about a system that they, and not the copyright owners, wanted and demanded, and which the copyright owners pay to administer.

Enforcement of the present law is not easy, and is left up to the copyright owners. But S. 1734 would deliberately make enforcement more difficult. The present compulsory license system at least allows copyright owners to tell at a glance if a particular jukebox is licensed, since it requires that a certificate be affixed to the jukebox. S. 1734 would do away with that requirement altogether. The only way a copyright owner could tell if a particular jukebox were licensed would be 1) to get a list of at least 100,000 serial numbers of licensed boxes from the Copyright Office; 2) to note the serial number of the box in question, which would require pulling the box away from the wall to examine the identification plate on the back or somehow examining the innards of the machine to find the identification plate; and then 3) to compare the number with the list. In practical terms, enforcement would be impossible. And when enforcement is impossible, compliance is poor or nonexistent.

Jukebox operators also falsely claim that copyright owners ruthlessly enforce the law: "In many cases, ASCAP or BMI enforcers have demanded and secured payments of $2,000 for at most a $25 violation." Replay, December 1983, "Save the Jukebox." The truth is that, in every case brought by ASCAP, the law-breaking jukebox operators have paid only a reasonable amount related to what they would have paid if they had complied with the law.

The jukebox spokesmen mischaracterize the law-breaking operator's illegal behavior as "at most a $25 violation." (In 1982 and 1983, that amount would have equaled the payment for only one jukebox.) But the lawsuits have been brought against noncomplying operators who own not one box each, but tens or hundreds of unlicensed boxes. The amount of settlement asked by copyright owners has related to the amount of compulsory license fees that would have been paid by the operator for all of his or her jukeboxes, often for more than one year.

In sum, not one of the justifications offered by the jukebox industry in support of a change in the current compulsory license system is valid.

CONCLUSION

For the past fifty years, jukebox operators have time and again pleaded poverty. Their claims have not withstood analysis in Congress, before the CRT or in court. Now they again trot out the same tired claims, unsupported by any hard data, in an effort to undo the work Congress so carefully crafted.

Not one of the justifications offered by the jukebox operators in support of S. 1734 is valid. The industry's cry of poverty is baseless. A true economic picture of the coin machine industry does not exist, and probably never will. But the evidence that does exist demonstrates that the operators' economic claims are biased, unreliable and in direct conflict with indications that the jukebox business is stronger than ever. As AMOA President Wes Lawson so aptly put it, the jukebox is "the backbone of the [coin machine] industry." And music is the backbone of the jukebox business.

S. 1734 should be rejected.

THE #1 MUSIC LICENSING
ORGANIZATION SINCE 1914

ascap 70

American Society of Composers, Authors and Publishers

Hal David
PRESIDENT

August 10, 1984

Hon Charles McC. Mathias, Jr.
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
United States Senate
Washington, D.C. 20510

RE: Jukebox Legislation -- S.1734

Dear Senator Mathias:

I am pleased to enclose ASCAP's responses to the written questions you, Senator Hatch and Senator Zorinsky have posed regarding S.1734.

In addition, at the hearings on the bill your Subcommittee held on June 20, Wesley Lawson, past President of the AMOA, introduced into the record the AMOA's 1983 Cost of Doing Business Survey. As we noted in our prepared statement, the AMOA's study, like all its past studies, was so shot through with methodological errors as to make it worthless.

For the purpose of completing the record on the errors in the AMOA study, I am enclosing copies of a letter dated March 14, 1984 from ASCAP's outside economic consultant, Robert R. Nathan, to James F. Gaertner, who conducted the AMOA's 1983 study; Dr. Gaertner's response of April 25, 1984; and Mr. Nathan's undated memorandum (which we received on June 6, 1984) assessing Dr. Gaertner's response. I ask that these documents be made part of the record.

Sincerely,

Hal David

HD:is
Enc.

cc: Senator Orrin Hatch
Senator Edward Zorinsky

ASCAP's ANSWERS TO QUESTIONS OF SENATOR CHARLES MATHIAS REGARDING S.1734

At the hearing on June 20, all of the witnesses agreed that non-compliance with the current system of jukebox royalty payments is a very substantial problem. Several witnesses suggested alternative methods of collecting jukebox royalties as a way to increase compliance or to improve the equity of the collection system. I would appreciate your comments about both the practicability and the fairness of each of these proposals. The three proposed methods are as follows:

1. Inclusion of a "performance right fee" in the price of recordings used in jukeboxes. (Obviously, some method would need to be found to avoid imposing this fee on non-commercial purchasers of recordings.)

ANSWER: This idea has often been raised by the jukebox operators in the past and uniformly rejected by Congress as wrong in principle and unworkable in practice. The right to perform is a separate and distinct right under the Copyright Law, and should not be combined with the right to record. Indeed, since copyright is divisible, different people might own the two rights. And, in practice, they are administered differently. Publishers normally license recording rights on behalf of writers, but performing rights are licensed by writers equally with publishers, through ASCAP.

Record companies make recordings. They must (and should) pay for the right to do so. Jukebox operators (and the establishment owners they serve) perform. They must (and should) pay for that right.

If a fee for the right to perform were imposed on record manufacturers, they would be paying for a right they neither need nor exercise under the Copyright Law. Such a fee, presumably to be added to the price of records sold only to jukebox operators, would be another form of one-time payment for the right to perform the recorded work over and over again -- the right of continuing public performance.

There are a number of practical problems with trying to include a performing right fee in the price of records intended for sale only to jukebox operators. To begin, record manufacturers would have to distinguish between records to be sold to the general public and records to be sold only to jukebox operators. When and how would that be done? Why should record manufacturers be involved in collecting and distributing performance fees? Whom would they pay? Normally, they pay only publishers, who in turn pay writers their share. Writers prefer to collect performance royalties through ASCAP, which they own and manage jointly with publishers.

How would Congress ensure that jukebox operators purchase only the (presumably) higher-priced records instead of the lower-priced ones, which are intended for sale to individuals? If operators placed records intended for home use on their machines, they would avoid paying any performing right license fees. What would prevent others from doing so? The administration of such a system -- separating the performance royalty from the cost of the record, and distributing the royalties to copyright owners -- would be a new, unnecessary, and, we think, quite unwelcome burden on record manufacturers. And ASCAP, BMI and SESAC would have the impossible burden of checking not merely to see whether a jukebox has a certificate, but whether each record in the box had the proper label.

Finally, record piracy has been a serious problem in this country and around the world. People willing to counterfeit records, albums and album jackets would find counterfeiting record labels childs-play and neither the record manufacturers, the jukebox operators, the establishment, nor anyone else would be the wiser.

For these reasons, this suggestion is wholly without merit.

2. Imposition of a one-time royalty fee on jukeboxes, paid by the manufacturer or purchaser. This one-time fee would amount to a payment in advance of the annual fees now paid by jukebox operators. (S. 1734 proposes such a fee, but the amount of that fee could be different than that proposed in S. 1734.) This fee could be fixed permanently, or adjusted from time to time by a federal agency or by Congress.

ANSWER: This proposal suffers from the same flaws as S. 1734.

Royalty fees currently collected from jukebox operators relate to the public performance of copyrighted musical compositions. Jukebox manufacturers have nothing to do with these performances. Establishment owners and jukebox operators do perform. They, not jukebox manufacturers, receive and share the revenues derived from performances the public pays to hear. Therefore, the present system, under which establishment owners and jukebox operators who customarily share the revenue from jukeboxes together compensate copyright owners makes economic sense.

There are now probably between 250,000 and 300,000 jukeboxes in operation and new ones are being manufactured at the rate of only 10-12,000 per year. The suggestion that manufacturers should pay does not begin to meet the non-compliance problem posed by the quarter of a million or more boxes in use now, of which only one-third are licensed. Even as to the new boxes, a one-time payment would not compensate copyright owners properly for the continuing use of their property. Payment of the fee in the year the jukebox is manufactured (or sold to an operator) would result in no payment whatsoever to the creators of music written and performed over that jukebox in future years. The inequity of a one-time payment would make any marginal gains in compliance worthless (if, in fact, any occurred).

We also think it obvious that any statutory fee would have to be adjusted periodically. The jukebox operators have always tried, in the past as now, to freeze the amount of the fee permanently. Congress has rejected this approach, recognizing that changing economic circumstances require that the fee must be adjusted periodically. See ASCAP Statement at 14-16.

We think periodic review of the license fee by Congress would be impractical. Congress has far more important things to do than hold periodic hearings on rate adjustments for jukeboxes. That is a function for a regulatory body, as Congress recognized when it created the CRT.

This one-time fee proposal is inequitable in both principle and practice, and should be rejected.

3. A pay-per-use system, in which jukebox operators would compensate songwriters based on the number of times that a jukebox is actually used.

ANSWER: Such a pay-per-use system is a form of license fee tied to the revenue of each machine. Under such a revenue-based system, jukeboxes which take in more would pay more. Such a system has much to commend it and is very much like the way ASCAP, BMI and SESAC license similar users of music.

The CRT considered, but rejected a revenue-based fee as impractical. Obviously, some method of keeping track of each machine's revenues would be necessary: perhaps a tamperproof counter to keep track of revenues (either by amount deposited or total plays) would have to be devised and installed in each machine. These counters would have to be examined regularly or at least sampled, to ensure compliance and proper reporting by jukebox operators. The costs of that amount of enforcement would necessarily be very high. And, we believe, jukebox operators would not allow accurate measurement of the revenues of their machines, for we know that many operators underreport revenues for tax purposes. (*See* *Play Meter*, "IRS Looks at Oregon Operators", September 1, 1983, at 12: the IRS found only 2 of 142 Oregon jukebox operators filed correct income tax returns in 1982.) The practical difficulties of such a system may well be insurmountable.

ASCAP'S ANSWERS TO QUESTIONS OF SENATOR ORRIN HATCH REGARDING S.1734

1. One of the other witnesses at the June 20 hearing stated that performing rights organizations such as yours have sued jukebox owners for more than $2,000 for a failure to pay a $25 or $50 fee. Would you comment on these charges, and more generally on your procedures for enforcing your rights under the jukebox copyright provisions?

ANSWER: ASCAP, on behalf of its members, has never sued any jukebox operator "for more than $2,000 for a failure to pay a $25 or $50 fee." The $25 or $50 fee applies to each individual machine. ASCAP has brought lawsuits against jukebox operators who own not one, but tens or hundreds of unlicensed boxes. See ASCAP Statement at 65. If these jukebox operators had been licensed, they would have paid license fees of $8, $25 or $50, depending on the year in question, for each box for each year from 1978 to the present. For example, an operator with 100 machines who failed to comply from 1978 through 1984 should have paid, in compulsory fees, $132 for each box, or a total of $13,200. That is the substantial non-compliance at which infringement suits are aimed. Thus, jukebox operators mischaracterize their lawbreaking activities as "at most a $25 or $50 violation."

ASCAP's procedures in bringing infringement suits work this way: Before any jukebox operator is sued, ASCAP advises the operator, in writing, of his obligations and potential liabilities under the Copyright Law. ASCAP urges the operator to comply with the law and advises the operator that it will verify compliance with the Copyright Office. After a reasonable period of time, ASCAP checks with the Copyright Office to see if the operator complied.

If the operator ignores his responsibility under the law after being informed of it, ASCAP notifies an establishment where one of the operator's jukeboxes is located of its potential liability under the law and urges the establishment to ask the jukebox operator to comply with the law. (The letters to the jukebox operator and the establishment are sent certified mail, return receipt requested, to ensure their delivery and receipt; copies of the forms of letters are attached as Exhibits "A" and "B", respectively.)

If the jukebox operator then fails to comply with the law, ASCAP employs a team of independent investigators, familiar with popular music, to visit the establishment and note every musical composition performed over the jukebox during their stay. The investigators are instructed not to deposit any money in the jukebox or make any selections. They are also asked to examine the jukebox for a copyright certificate.

If copyrighted musical compositions in the ASCAP repertory are performed during the investigation, those performances become the basis for a suit for copyright infringement brought by ASCAP on behalf of the members whose works were infringed.

Before any suit is brought, ASCAP again verifies the ownership of the jukebox which has rendered the unauthorized performances, and the operator's non-compliance. Thereafter, a complaint for copyright infringement is prepared and forwarded to ASCAP's local counsel with instructions to write to the defendant and offer to settle the matter without litigation. If there is no satisfactory response, the complaint is filed.

If the defendant wishes to settle, as most do, ASCAP offers to settle the litigation for an amount related to the amount of compulsory license fees the defendant would have paid if all of his jukeboxes had been licensed, plus costs.

Virtually all of ASCAP's cases have been settled;

the remainder have gone to default or summary judgment against the infringing jukebox operator.

2. Senator Zorinsky commented at the June 20 hearing that songwriters benefit tremendously from the exposure that they get by having their songs played on jukeboxes, and that as a result jukebox royalty fees should be kept low. Do you agree with that comment?

ANSWER: No. Every kind of music user -- from radio broadcasters to discotheque owners to background music operators -- has at some point made that same argument. It has long been put to rest.

Even if the performance of songs by jukeboxes gives exposure to the music and leads to greater record sales, it is the performing artist and the record company, not the songwriter, who primarily benefit from these sales. Very little of a songwriter's income is derived from record sales. Rather, the writer's principal source of income is performing rights royalties. And sworn testimony before the CRT showed that jukebox programmers follow hits made in other media, especially radio, and do not buy records before they have become popular.

Clearly, if this argument's specious logic were followed, all users would pay very little for the valuable performing right.

3. The number of jukeboxes registered with the Copyright Office has declined each year since 1979. Does this decline show that royalty fees are contributing to a shrinking of the jukebox industry?

ANSWER: No. The decline in the number of jukeboxes registered with the Copyright Office does not show that payment of compulsory license fees by jukebox operators is a contributing factor in the alleged "shrinkage" of the jukebox business.

Former AMOA President Wes Lawson recently presented data to the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, in connection with its review of a companion bill, H.R. 3858, comparing the operating costs of his coin-machine business for the years 1979-1983. This data showed an overall weekly increase of $6.96 in the operating costs of jukeboxes for that period. However, only 37¢ of this $6.96 increase was due to increased copyright fees.

Thus, if there is any decline in any aspect of this business, it is attributable to factors having nothing to do with the music fee, such as high interest rates and increased labor and equipment costs. These factors were prevalent before the compulsory license ever took effect, as evidence by a sharp decline in the number of jukeboxes produced -- from 49,000 in 1973 to 25,000 in 1976 and 1977, before any music performance fee was paid.

More important, the AMOA itself admits it is likely that one half or more of all jukeboxes are not now and never have been registered. The jukebox business cannot be suffering because of license fees it never paid. Clearly, payment of the compulsory license fee cannot have contributed to the so-called decline of the jukebox business. The decline in registrations shows only that jukebox operators are continuing to flout the law in ever greater numbers, possibly because ASCAP and BMI have not been so vigorous in suing infringers as the situation called for.

Even the results of the AMOA's own 1981 and 1983 Cost of Doing Business Surveys show that the compulsory license fee has had no effect on the jukebox business. Jukebox operators continued to realize a profit after the fee went from $8 to $25. The surveys show that between 1980 (when the fee was $8)and 1982 (when the fee was raised to $25), the profit of jukebox operators increased by 80% -- from $72.58 per jukebox to $135.86 per jukebox. (We do not agree with the surveys' methodology, a point we have addressed elsewhere.)

4. Assuming that the Committee agrees with you that we should retain a system of continuing payments for continuing performances, would you consider a reduction in the annual royalty fee to reduce the burden on the jukebox industry?

ANSWER: No. This question is premised on an erroneous assumption -- in fact, there is no "burden" on the jukebox business resulting from the reasonable annual compulsory license fee. If any burden exists, it is due to other factors, such as increased costs and decline in revenues from video games and pinball games. The compulsory license fee is less than the average amount paid in foreign countries and 75% less than the lowest fees paid for similar uses in this country. For the establishment owner, who bears half the cost, the jukebox is almost pure profit. No reduction in the fee is warranted.

EXHIBIT A

THE #1 MUSIC LICENSING
ORGANIZATION SINCE 1914

American Society of Composers, Authors and Publishers

William R. Lee
GENERAL LICENSING
PROJECT MANAGER

Gentlemen:

The United States Copyright Law requires that the owner/operator of a jukebox obtain an annual compulsory license from the United States Copyright Office. We have recently discovered that certain jukeboxes owned or operated by you do not display a 1984 copyright office certificate.

To comply with the law, you should (1) register each jukebox placed in a location with the United States Copyright Office; (2) pay a $50 annual license fee for each jukebox on location; and (3) affix a certificate (which will be supplied by the Copyright Office) to each jukebox in a place where it may be readily examined by the general public.

The Copyright Law is clear, that EACH jukebox which you own or operate requires its own Copyright certificate. Each performances of copyrighted music on your jukeboxes is a copyright infringement for which you may be sued and held liable for damages. The Copyright Law provides for damages ranging from $250 to $10,000 for each copyrighted song performed without a license, in the discretion of the Federal Court.

For your convenience, we have enclosed an application form and explanatory brochure published by the United States Copyright Office.

This letter is formal notice to you, both of the requirements of the law, and of your liability in an action in the Federal Court for willful infringement if our members' copyrighted works are performed on any of your jukeboxes without proper license.

ASCAP is determined to protect the copyrights of our members. We therefore urge that you fully comply with the law. If our records are incorrect and you are in complete compliance with the law, please notify us so that this discrepancy can be rectified. Thirty days from the date of this letter we will do further research to verify your compliance under the United States Copyright Law.

Should you have any questions regarding your responsibilities under the United States Copyright Law, you should contact the Licensing Division of the Copyright Office at the address and phone number shown below.

Very truly yours,

WILLIAM R. LEE

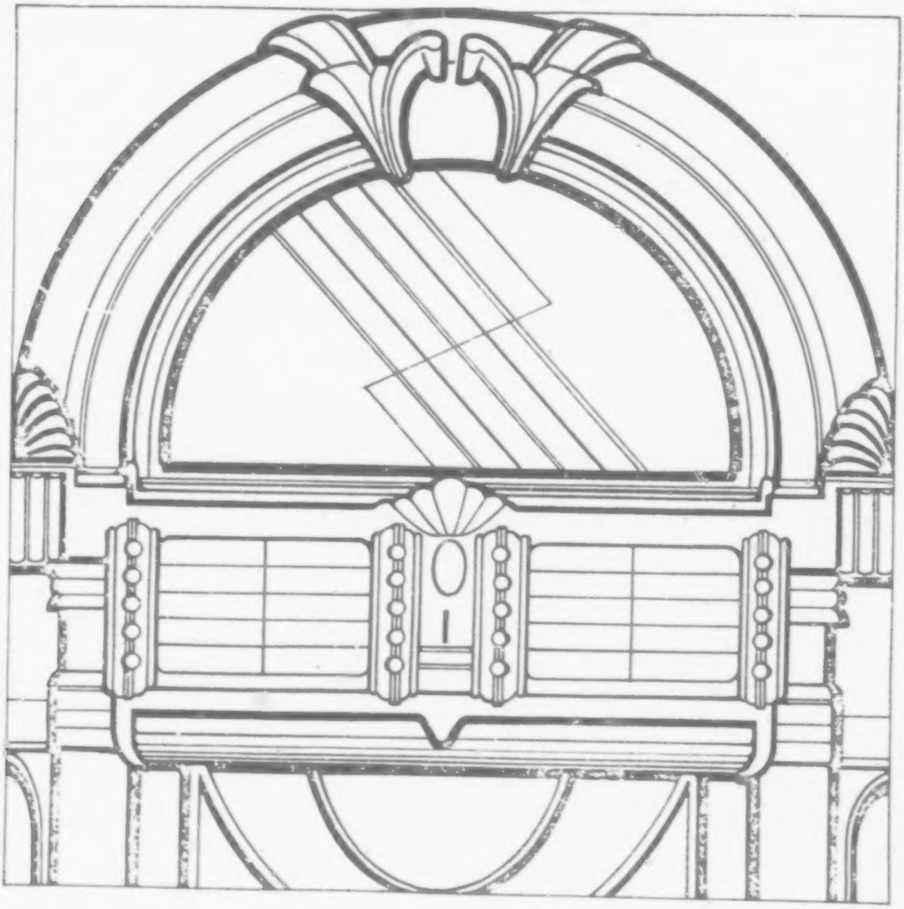
WRL:gi
Enclosures

cc: Licensing Division
United States Copyright Office
Library of Congress
Washington, D.C. 20557
Telephone No. (202) 287-8130

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Circular R70

Performances of Music on Coin-Operated Phonorecord Players



Performances of Music on Coin-Operated Phonorecord Players

Information About Compulsory Licensing of Performances of Music on Jukeboxes Under the Copyright Law

NEW COPYRIGHT LAW ON JUKEBOX PERFORMANCES

As of January 1, 1978, public performances of recorded music on "coin-operated phonorecord players" (commonly called "jukeboxes") are no longer free from copyright liability.

In general, the revised Copyright Act (Title 17, United States Code, §116) gives the owner of copyright in a "nondramatic musical work embodied in a phonorecord" the exclusive right "to perform the work publicly by means of a coin-operated phonorecord player." However, there is an important limitation on this exclusive right: instead of requiring separately negotiated licenses for each jukebox performance, the statute establishes an annual royalty fee and sets out a procedure for obtaining compulsory licenses covering all performances on particular jukeboxes.

COMPULSORY LICENSES FOR JUKEBOX PERFORMANCES

What Is a "Compulsory License"?

Ordinarily if someone wants to use a copyrighted work for commercial purposes, that person must first negotiate a license with the copyright owner and pay whatever royalty the license calls for. In a few special situations, however, the copyright law gives the user an opportunity to obtain a "compulsory license." Under a compulsory license, the copyrighted work can be used in certain ways without permission from the copyright owner, as long as the user follows a procedure set out in the statute and pays established royalty fees at stated intervals.

How the Jukebox Compulsory License Works

The compulsory license for jukebox performances is provided by section 116 of the new copyright law, and is implemented by Copyright Office regulations. To summarize section 116 very generally: if an operator pays the applicable royalty fee per jukebox, and affixes a certificate to each of the jukeboxes, performances of music on that operator's machines during the licensing period are free from further copyright liability. The fees are collected into a fund and distributed annually to copyright owners through the new Copyright Royalty Tribunal.

Effect of Not Having a Compulsory License

If a jukebox operator fails to comply with the compulsory licensing requirements with respect to a particular jukebox, every unauthorized public performance of a copyrighted musical work on that machine will be a separate act of copyright infringement under the statute. This means that copyright owners could bring one or more civil (or, in some cases, criminal) actions for damages and other remedies against the operator in the Federal courts.

WHO CAN OBTAIN A COMPULSORY LICENSE?

Under the law, the right to obtain a compulsory license belongs to the "operator" of a "coin-operated phonorecord player." These two terms are defined in the statute.

"Operator": Any person who, alone or jointly with others: (1) owns the player, or (2) has the power to make the player "available for placement in an establishment for purposes of public performance", or

(3) "has the power to exercise primary control over the selection of the musical works made available for public performance" on the player.

"Coin-Operated Phonorecord Player": A machine or device that: (1) is used solely for performing nondramatic music; (2) is activated by inserting coins, tokens, or currency; (3) allows patrons to select the works to be played from a list of titles; and (4) is located in an establishment making no admission charge.

PROCEDURE FOR OBTAINING A COMPULSORY LICENSE

General Requirements

To obtain a compulsory license for jukebox performances, the operator must generally do three things:

1. File an application identifying each jukebox to be covered before or within 1 month after the date performances were first made available on that player;
2. Pay into the Licensing Division of the Copyright Office a royalty fee for each jukebox identified on the application; and
3. Affix a certificate issued by the Copyright Office to each licensed jukebox.

There are strict time limits for complying with each of these requirements. To remain valid, a compulsory license must be obtained annually.

Application for Recordation of Jukeboxes

The application that the jukebox operator is required to file must be submitted on Form JB, which can be obtained on request from the Licensing Division of the Copyright Office. The form (with as many continuation sheets as necessary) should separately identify every "coin-operated phonorecord player" of which the person filing the form is the "operator."

Royalty Fee

The following fee schedule should be used to determine the applicable royalty fee for each year:

YEAR	ROYALTY FEE
1982	$25.00
1983	$25.00
1984	$50.00
1985	$50.00
1986	$50.00
1987	$50.00, subject to a cost of living adjustment

Along with the application on Form JB, the operator is required to send a full payment of the royalty fee for all of the jukeboxes listed on the form. The total amount of royalties payable is computed by multiplying the total number of phonorecord players listed on the form by the statutory royalty fee. As an exception, the statute provides that, if performances "are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee to be deposited for the remainder of that year" is one-half the applicable annual rate for that year. Phonorecord players covered by full-year fees should not be mixed with phonorecord players covered by half-year fees on the same application.

Remittances accompanying Form JB must be in the form of a certified check, cashier's check, or money order, payable to: **Register of Copyrights.** The Copyright Office will not issue a certificate for affixation to a jukebox until it has received an acceptable remittance covering the royalty fee for that player.

RENEWING A COMPULSORY LICENSE

The operator will need to renew the certificates for the next year in order to continue performing music on the machines under the compulsory licensing provisions of the copyright law.

The Copyright Office will mail renewal application Form JB/R and two copies of a computer printout of the information the jukebox operator provided the Copyright Office in the previous year.

The computer printouts are not certificates.

The operator *must* return Form JB/R, together with appropriate attachments and fee, between January 1 and January 31 in order to receive renewal certificates.

CERTIFICATE OF RECORDATION

Issuance of Certificate

After receiving an acceptable application and fee, the Copyright Office is given 20 days in which to issue a separate certificate for each phonorecord player. The certificate consists of two parts, each 1" × 3" in size, and contains the name and address of the operator, identification of the particular coin-operated phonorecord player, date of expiration of the license, date of issuance of the certificate, and requirements of affixation. Certificates issued upon payment of the half-year fee will not be valid until after July 1 of the year of issuance. The certificate will be mailed to the operator whose name and address appear on the application.

Where and When to Affix the Certificate

The statute requires the operator to affix the certificate to the phonorecord player "in a position where it can be readily examined by the public." The certificate may be placed on the record selection (title strip) panel, but if so, both parts must be clearly visible. The statute also provides strict time limits for affixing the certificate. It must be affixed "on or before March 1" of the year in which it is issued, or "within 10 days after the date of issue of the certificate," whichever is later.

Replacement of the Certificate

A lost or destroyed certificate can be replaced. For specific information, write the Licensing Division of the Copyright Office.

Correction and Refund of the Certificate

Upon compliance with strict procedures and time limits, corrections to applications will be made, and corrected certificates and refunds will be issued in certain cases. For specific information, write the Licensing Division of the Copyright Office.

DISTRIBUTION OF ROYALTIES FOR JUKEBOX PERFORMANCES

Statutory Procedure

Compulsory licensing fees paid by jukebox operators are received and accounted for by the Copyright Office, which deposits them into a fund in the U.S. Treasury for distribution by a newly created government body, the Copyright Royalty Tribunal. During January of each year, persons or organizations who believe they are entitled to share in the jukebox royalties for the preceding year should file a claim with the Tribunal. Then, after the beginning of October of that year, the Tribunal distributes any royalties not in controversy and conducts proceedings aimed at settling any disputes over distribution.

How Are the Royalties to Be Divided?

The statutory formula for dividing royalties allows a "copyright owner not affiliated with a performing rights society" to receive "the pro rata share . . . to which such copyright owner proves entitlement." The remainder goes to the performing rights societies, either in accordance with an agreement among them or on the basis of a factual determination by the Tribunal as to the correct division. For this purpose, a "performing rights society" is defined as "an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc."

WHERE TO OBTAIN FORMS AND INFORMATION

- **For Jukebox Operators:** If you need Form JB or more information about obtaining and maintaining a compulsory license, contact:

Licensing Division, LM-454
Copyright Office
Library of Congress
Washington, D.C. 20557
Telephone: (202) 287-8130

In any request for application forms (Form JB), please give an estimate of the number of jukeboxes to be licensed, so that you will be sent enough continuation sheets (Form JB/CON).

- **For Copyright Owners:** If you need information about distribution of royalties, write to:

Copyright Royalty Tribunal
1111—20th Street, N.W.
Washington, D.C. 20036

APPLICATION FOR RECORDATION OF *Coin-Operated Phonorecord Players*

FORM JB

LICENSING DIVISION
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C. 20557

USE THIS FORM WHEN:

- You are the operator of one or more coin-operated phonorecord players (jukeboxes), and
- You want to obtain a compulsory license to cover public performances of copyrighted music on your jukeboxes, as provided by the new copyright law, and
- You are also sending to the Licensing Division of the Copyright Office the statutory royalty fee for each jukebox listed on the form.

Copyright Law on Jukebox Performances: As of January 1, 1978, public performances of recorded music on jukeboxes were no longer free from copyright liability. In general, the Copyright Act gives the owner of copyright in a "nondramatic musical work embodied in a phonorecord" the exclusive right "to perform the work publicly by means of a coin-operated phonorecord player." However, there is an important limitation on this exclusive right: instead of requiring negotiated licenses for jukebox performances in all cases, the statute (17 U.S.C. §116) establishes an annual royalty fee and sets out a procedure for obtaining compulsory licenses covering performances on particular jukeboxes.

General Requirements for Compulsory Licenses: Obtaining a compulsory license for jukebox performances generally requires the "operator" to do three things:

(1) File an application on Form JB, identifying each jukebox to be covered;

(2) Pay into the Copyright Office a royalty fee for each jukebox identified on the application;

(3) Affix a certificate issued by the Copyright Office to each licensed jukebox.

There are strict time limits for each of these requirements. To remain valid, a compulsory license must be obtained annually. Detailed information and instructions concerning these requirements appear on the back of this page.

Effect of Having (Or Not Having) a Compulsory License: As long as a compulsory license is in effect for a particular coin-operated phonorecord player (jukebox), the performances of nondramatic music on that player are free from further copyright liability. On the other hand, if an operator fails to comply with the compulsory licensing requirements with respect to a particular jukebox, every unauthorized public performance of a copyrighted musical work on that machine will be a separate act of copyright infringement under the statute. This means that one or more civil (or, in some cases, criminal) actions for damages and other remedies could be brought against the operator in the federal courts.

How to Obtain a Compulsory License:

First: Study the general information on this page, then turn the page over and read through the detailed information and specific instructions for filling out Form JB. Make sure, before starting to complete the form, that you have all of the information you will need to identify the phonorecord players in space **E.**

Second: Complete all applicable spaces on the form, following the detailed instructions. To list more than 15 phonorecord players, use as many continuation sheets (Form JB/CON) as you need; supplies can be obtained from the Licensing Division of the Copyright Office. Use typewriter, or print the information in dark ink. **Be sure to sign the form at space C.**

Third: Compute the total royalty fee, following the detailed instructions on the back of this page, and obtain a certified check, cashier's check, or money order in the full amount. It should be payable to: *Register of Copyrights.*

Fourth: Detach this sheet and send your completed application (including any continuation sheets) **together with the royalty fee,** to: Licensing Division, Copyright Office, Library of Congress, Washington, D.C. 20557. Take special care to observe the statutory time limits described on the back of this page.

Fifth: As soon as possible after receiving your certificates from the Copyright Office, and no later than the statutory deadline, affix the correct certificate to each phonorecord player, in accordance with the requirements outlined on the next page.

PRIVACY ACT ADVISORY STATEMENT

Required by the Privacy Act of 1974 (Public Law 93-579)

AUTHORITY FOR REQUESTING THIS INFORMATION:
- Title 17, U.S.C. §116

FURNISHING THE REQUESTED INFORMATION IS:
- Voluntary

BUT IF THE INFORMATION IS NOT FURNISHED:
- It may be necessary to delay or refuse issuance of the certificate
- You may be liable for civil or criminal penalties for copyright infringement with respect to public performance of nondramatic musical works on a coin-operated phonorecord player (17 U.S.C. §§502-506, 509)

PRINCIPAL USES OF REQUESTED INFORMATION:
- Preparation of detailed statements of account for the Copyright Royalty Tribunal
- Establishment and maintenance of a public record
- Examination of the application for compliance with legal requirements before issuance of a certificate

OTHER ROUTINE USES:
- Public inspection and copying
- Preparation of public indexes
- Publication and sale of listings
- Preparation of search reports upon request

NOTE:
- No other advisory statement will be given you in connection with this application
- Please retain this statement and refer to it if we communicate with you regarding this application

More Information About Compulsory Licenses For Jukebox Performances

WHO CAN OBTAIN A COMPULSORY LICENSE?

Under the law the right to obtain a compulsory license belongs to the "operator" of a "coin-operated phonorecord player."

- An *"operator"* is any person who, alone or jointly with others: (1) owns the player, or (2) has the power to make the player "available for placement in an establishment for purposes of public performance", or (3) "has the power to exercise primary control over the selection of the musical works made available for public performance" on the player.
- A *"coin-operated phonorecord player"* is a machine or device (usually called a "jukebox") that: (1) is used solely for performing nondramatic music, (2) is activated by inserting coins, tokens, or currency; (3) allows patrons to select the works to be played from a list of titles, and (4) is located in an establishment making no admission charge.

WHEN TO FILE FOR A COMPULSORY LICENSE:

Submit a Form JB application identifying each jukebox to be covered before or within one month after the date performances were first made available on that player. NOTE: The operator will need to renew the certificates for the next year. The Licensing Division will mail the renewal application Form JB/R to the operator.

Payment of the total royalty fee for all of the coin-operated phonorecord players listed on the application must accompany Form JB. Your remittance must be in the form of a certified check, cashier's check, or money order, payable to: Register of Copyrights.

CERTIFICATE OF RECORDATION:

- ***Issuance of Certificate:*** After receiving an acceptable application and fee, the Copyright Office is given 20 days in which to issue a separate certificate for each phonorecord player. The certificates will be given a "date of issue" and will be mailed to the operator at the address given in space **A** on Form JB.

- ***Affixing the Certificate:*** The statute requires the operator to affix the certificate to the phonorecord player "in a position where it can be readily examined by the public," and it provides strict time limits for doing so. The certificate must be affixed "on or before March 1" of the year in which it is issued, or "within 10 days after the date of issue of the certificate," whichever is later.

IMPORTANT: The Copyright Office will not issue a certificate for any jukebox listed on the application until it has received the required information and an acceptable remittance covering the total royalty fee for that application.

HOW TO FILL OUT FORM JB

Specific Instructions for Spaces A thru E

SPACE A: OPERATOR OF PHONORECORD PLAYER

- **General Instructions:** Make sure that the person or organization identified in this space is the "operator" of all of the "coin-operated phonorecord players" identified on the form. The meaning of these terms is explained in the column to the left.
- ***Name of Operator:*** Give the full legal name of the operator, followed by any fictitious or assumed name or names that are used for conducting business. If the operator is a partnership, give the name of the partnership followed by the name of at least one individual partner.
- ***Address of Operator:*** Give the full address at which the operator actually conducts business. A post office box or similar designation will not generally be accepted.

SPACE B: SUMMARY OF APPLICATION

- ***Licensing Year:*** Give the calendar year that this application covers. The licensing year covers January 1 through December 31.
- ***Royalty Rate:*** Locate the statutory royalty rate that corresponds to the licensing year covered by this application.

1982—$25.00
1983—$25.00
1984—$50.00
1985—$50.00
1986—$50.00

- ***Number of Players:*** Count the number of coin-operated phonorecord players (jukeboxes) identified on the application (including all continuation sheets), and give the total. Multiply the total number of players by the statutory royalty rate.
- ***Provision for Half-year Certificates:*** The statute provides that: if performances "are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee" is one half the statutory royalty rate. *Do not mix* jukeboxes paid at the full year rate with jukeboxes paid at the half year rate on the same application; file separate applications.

SPACE C: CERTIFICATION

The application is not acceptable unless it bears the handwritten signature of the operator of the coin-operated phonorecord players, or of the duly authorized agent of the operator. If a business entity is identified as the operator in space **A**, the signature should be that of a corporate officer (if the entity is a corporation), or that of a partner (if the entity is a partnership).

SPACE D: INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED

Identify an individual person whom we can call or write to about this application. Include that person's full address and telephone number, including area code.

SPACE E: IDENTIFICATION OF COIN-OPERATED PHONORECORD PLAYERS

- ***General Instructions:*** Each phonorecord player must be listed separately; do not combine information about different machines in the same line. You do not need to list the players in any particular order, but it will help us in issuing certificates if you bring together machines made by the same manufacturer on consecutive lines.
- ***Manufacturer:*** The manufacturer must be identified separately for each coin-operated phonorecord player listed on the application. Give the full name except for the following: For Rock-Ola Manufacturing Corp. give RKA, for Rowe International, Inc. give RWE, for Seeburg Corp. give SE, for Wurlitzer Co. give WR.
- ***Serial Number:*** If there is a serial number on the machine, it must be given on the application. If the machine never had a serial number, or if its number has been removed or defaced, the space can be left blank, but in that case the other identifying information must be given.
- ***Other Identifying Information:*** You may leave the spaces in the right hand column of a particular line blank if you have given the serial number for the player.

APPLICATION FOR RECORDATION OF COIN-OPERATED PHONORECORD PLAYERS

FOR COPYRIGHT OFFICE USE ONLY	
AMOUNT	REMITTANCE NUMBER
APPLICATION RECEIVED	
CERTIFICATE(S) ISSUED	
CERTIFICATE(S) MAILED	

FORM JB
COPYRIGHT OFFICE

(A) Operator

NAME AND ADDRESS OF OPERATOR:
Name
Address
(Number and Street)
(City or Town) (State) (Zip Code)

(B) Summary of Application

LICENSING YEAR: (Give the calendar year covered by this application.)	**ROYALTY RATE:** (Locate the statutory rate that corresponds to the licensing year, as explained in the instructions.)	**NUMBER OF PLAYERS:** (Give the total number of players listed in this application including continuation sheets.) Multiply this number by the royalty rate	**TOTAL ROYALTY FEE:**
Year 19	$	X =	$

(C) Certification

CERTIFICATION ✱ I, the undersigned, hereby certify that I am the: (Check one)
☐ operator ☐ duly authorized agent of operator
(Name of operator)
of the phonorecord players identified in this application, and that the statements made by me are correct to the best of my knowledge.

Handwritten signature: (X)
Typed or printed name
Title
(Corporate officer or partner — See instructions)
Date

(D) Contact

INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED:

Name
Telephone ( ) (Area Code)
Address
(Number, Street, Rural Route, Apt. No.)
(City, Town, State, Zip Code)

(E) Identification

IDENTIFICATION OF COIN-OPERATED PHONORECORD PLAYERS: Full name or abbreviation of manufacturer must be given in all cases. Serial number must be given if available. Other information must be given if serial number is lacking. See instructions.

1	Manufacturer Serial Number FOR COPYRIGHT OFFICE USE ONLY	Other identifying information Model No. Model Year Type of Sound ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other Record Capacity Charge per play Model Name
2	Manufacturer Serial Number FOR COPYRIGHT OFFICE USE ONLY	Other identifying information Model No. Model Year Type of Sound ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other Record Capacity Charge per play Model Name
3	Manufacturer Serial Number FOR COPYRIGHT OFFICE USE ONLY	Other identifying information Model No. Model Year Type of Sound ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other Record Capacity Charge per play Model Name

U.S. GOVERNMENT PRINTING OFFICE: 1982 361-279/511

August 1982 20,000

E
(Continued)

4
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

5
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

6
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

7
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

8
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

9
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

10
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

11
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

12
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

13
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

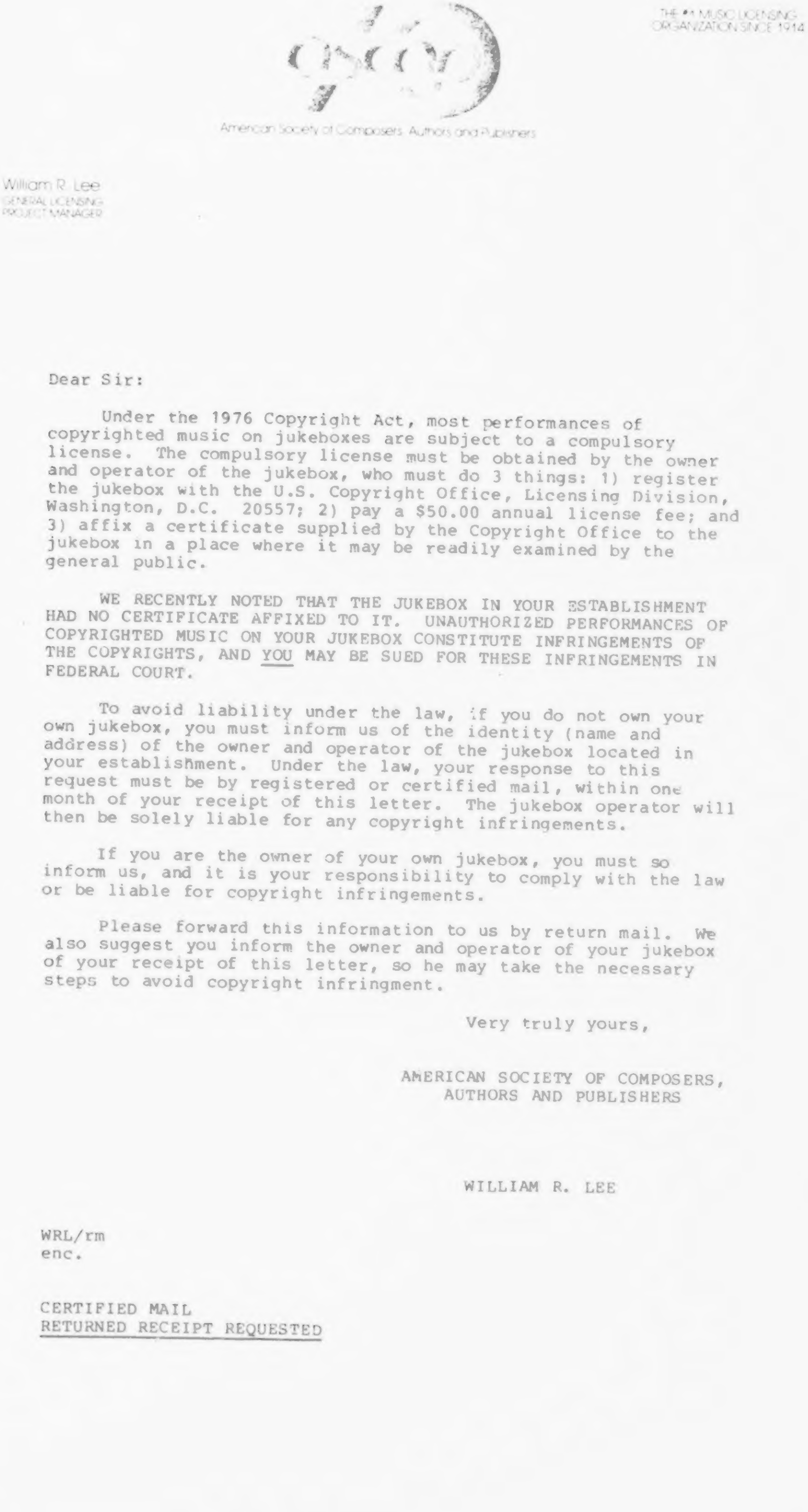
14
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

15
Manufacturer
Serial Number
FOR COPYRIGHT OFFICE USE ONLY
Other identifying information:
Model No. Model Year
Type of Sound: ☐ Mono ☐ Stereo ☐ Quadraphonic ☐ Other
Record Capacity Charge per play
Model Name

USE FORM JB/CON TO LIST ADDITIONAL PLAYERS

● 17 USC § 116 (d) CRIMINAL PENALTIES—Any person who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b)[of § 116], or who knowingly alters a certificate issued under clause (1)(B) of subsection (b)[of § 116] or knowingly affixes such a certificate to a phonorecord player other than the one it covers shall be fined not more than $2,500.

EXHIBIT B



THE #1 MUSIC LICENSING
ORGANIZATION SINCE 1914

American Society of Composers Authors and Publishers

William R. Lee
GENERAL LICENSING
PROJECT MANAGER

Dear Sir:

Under the 1976 Copyright Act, most performances of copyrighted music on jukeboxes are subject to a compulsory license. The compulsory license must be obtained by the owner and operator of the jukebox, who must do 3 things: 1) register the jukebox with the U.S. Copyright Office, Licensing Division, Washington, D.C. 20557; 2) pay a $50.00 annual license fee; and 3) affix a certificate supplied by the Copyright Office to the jukebox in a place where it may be readily examined by the general public.

WE RECENTLY NOTED THAT THE JUKEBOX IN YOUR ESTABLISHMENT HAD NO CERTIFICATE AFFIXED TO IT. UNAUTHORIZED PERFORMANCES OF COPYRIGHTED MUSIC ON YOUR JUKEBOX CONSTITUTE INFRINGEMENTS OF THE COPYRIGHTS, AND YOU MAY BE SUED FOR THESE INFRINGEMENTS IN FEDERAL COURT.

To avoid liability under the law, if you do not own your own jukebox, you must inform us of the identity (name and address) of the owner and operator of the jukebox located in your establishment. Under the law, your response to this request must be by registered or certified mail, within one month of your receipt of this letter. The jukebox operator will then be solely liable for any copyright infringements.

If you are the owner of your own jukebox, you must so inform us, and it is your responsibility to comply with the law or be liable for copyright infringements.

Please forward this information to us by return mail. We also suggest you inform the owner and operator of your jukebox of your receipt of this letter, so he may take the necessary steps to avoid copyright infringment.

Very truly yours,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

WILLIAM R. LEE

WRL/rm
enc.

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

ASCAP'S ANSWERS TO QUESTIONS OF
SENATOR EDWARD ZORINSKY
REGARDING S. 1734

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1. On page 20 of your testimony, you quote from the Court of Appeals decision saying that the CRT made the specific finding that its adjustment of the compulsory license fee would not "have a disruptive impact on the structure of the jukebox industry or disturb generally prevailing industry practices." In light of what has happened to the jukebox industry in the years since the fee increase, what basis do you have for that statement?

ANSWER: The statement referred to was made by the CRT on the basis of the record before it, and was accurate. We have seen no facts that indicate that the adjustment of the compulsory license fee has had a disruptive impact on the jukebox business. Data supplied by Wesley Lawson, former President of the AMOA, indicates that his weekly costs rose $6.96 from 1979 to 1983. Only 37 cents of that increase, he said, was attributable to increased compulsory license fees. The coin machine industry may claim economic hardship, but any such hardship is not due to the a decline in jukebox business. For example, data reported in the trade press show only a slight decline in jukebox revenues, compared to precipitous drops in video game and pinball revenues. See, Play Meter, November 1, 1983, p. 42, which showed weekly revenues as follows:

	'77	'78	'79	'80	'81	'82	'83
Video Games	44	50	64	102	140	109	70
Pinballs	44	62	65	63	66	55	38
Phonographs	46	52	54	50	55	51	50

The percentage decline from 1981 to 1983 (based on the underlined figures in the table) was 50% for video games, 42% for pinballs, but only 9% for jukeboxes. And this data shows no decline between the 1980 data available to the CRT and the 1983 data.

The average annual revenue per jukebox is about $2500. The $50 annual fee is only 2% of that total -- a modest fee by any standard. See, generally, ASCAP Statement at 29-60.

2. Do you support overturning the Supreme Court decision in the Sony Betamax case? If so, do you support Senator Mathias' bill for a one-time copyright fee on those machines?

ANSWER: ASCAP supports overturning the Supreme Court's decision in the Sony case through legislation. Copyright owners should be compensated for home recordings of their copyrighted works.

ASCAP also supports Senator Mathias' bill, which is designed to compensate copyright owners for these home recordings.

The home taping bill would require payment of a royalty fee by importers and manufacturers for each home recording device sold, and also would provide for payment of a royalty on each blank tape sold. Such fees are proper, and not analogous to S. 1734, because they pertain to one-time recording rights, rather than continuing performing rights. Tapes, of course, are generally re-used, and therefore a fee on each blank tape sold, as well as on each machine sold, is neccessary if compensation is to be fair. Unlike S. 1734, Senator Mathias' bill would permit the parties to negotiate the royalty and provide for periodic adjustment of the fees to reflect changed economic circumstances.

3. On pages 29 and 30, you state that the "cash receipts from these businesses...are seldom reported accurately." What facts do you have to back up that statement?

ANSWER: During the CRT hearings in 1980, there was sworn, uncontradicted testimony by two representatives of the Chicago Better Government Association who, in the course of an investigation of municipal corruption, ran a typical bar with a jukebox. They found that the practice of "skimming", or underreporting of cash receipts, by jukebox operators in Chicago was widespread. Jukebox Royalty Fees Proceedings, Hearings before the Copyright Royalty Tribunal, May 19, 1980, at 49-52; ASCAP Statement at 46. _See also_ Zay N. Smith and Pamela Zekman, _The Mirage_ (1979).

The practice of "skimming" in cash businesses has been widely recognized and discussed extensively by leading economists and economic publications. _See_ Gutman, The Subterranean Economy, 3 _Financial Analyst_ at 26 (November/December 1977); _Business Week_, March 13, 1978 at 73; Laurent, Currency and the Subterranean Economy, _Economic Perspective_ (Federal Reserve Bank of Chicago) at 3 (March/April 1979); Schultz, The Untaxed Millions, _N.Y. Times_, March 16, 1980 (Magazine) at 42.

And, in its September 1, 1983 issue, _Play Meter_ reported on the IRS' investigation in Oregon to uncover unreported revenues of coin-machine operators. The IRS manager in Oregon advised _Play Meter_ that the IRS had selected the coin-machine industry for examination because "it's a cash operation and easy to skim." The result of the investigation disclosed that only 2 out of 142 coin-machine operators had filed correct income tax returns for 1982. _Id_. at 12.

4. How much of the 4 1/2 million dollars collected so far this year will your organization receive? How much will the artists collectively receive? What is the average amount paid to an artist?

ANSWER: ASCAP, BMI and SESAC have reached a voluntary and confidential agreement on the distribution of jukebox compulsory license fees for the year 1984, in accordance with the provisions of the Copyright Law, 17 U.S.C. §116(c)(2). The agreement forbids any disclosure of the division of royalties among the three organizations.

All of the revenues ASCAP collects, including those received from jukebox royalty distributions, are paid to members, after operating costs only are deducted. ASCAP's operating expenses are approximately 19% of total collections, so that approximately 81% of all revenues are distributed to members.

In 1983, the average amount paid by ASCAP to a member was about $3,939.

RRNA
CONSULTING ECONOMISTS

March 14, 1984

Dr. James F. Gaertner
Division of Accounting and BDS
University of Texas
San Antonio, Texas 78285

Dear Dr. Gaertner:

I was pleased to have the opportunity to meet you at the recent meeting for the purpose of discussing the important economic aspects of the jukebox industry. As you will recall, I made a few comments and also indicated that I would be corresponding with you for the purpose of asking a few questions about your survey for AMOA entitled "Cost of Doing Business Survey and Report." As you know, I have reviewed both the 1981 and 1983 reports prepared by you.

With respect to the sample, no one knows the universe of operators we are trying to gather information about. You have used the AMOA membership as the universe. I agree with you that it would have been desirable to have received a larger number of returns than 93 out of 641 to whom questionnaires were sent in 1983. I understand that the 93 usable responses did not include answers to all the questions. How many answered each question?

It would be helpful to know the number of AMOA members from which the 641 were selected. You stated that the 1983 survey was stratified based on the number of machines operated per member. What were the strata and how many AMOA members were in each stratum?

You further stated that a comparison was made between the characteristics of the first respondents as compared with the characteristics of those who responded only after the second mailing, and that the results of this comparison indicated no significant statistical difference between the two sets of responses. Can you give us the distribution by strata of each of these two sets of responses? Also, for the total, could you state the distribution by strata (i.e., in terms of number of machines per member) of the 93 usable responses and the total membership of AMOA? You stated that you performed significance tests for "all relevant variables." Can you list these variables and provide us with frequency distributions of the characteristics tested?

As you will recall, I was rather concerned about the results for the year 1981 which were derived from the survey conducted that year as compared with the 1981 data derived in the 1983 survey, which requested information for 1979, 1980, 1981 and 1982.

These four-year statistics covered in the 1983 survey related only to numbers of units operated and numbers of locations. The 1981 survey results differ very greatly from the 1981 data collected in the 1983 survey. It is difficult to conceive of two properly conducted samples showing such vastly different results for 1981 as the changes reflected in the 1981 data collected in 1983 and shown in Table 3.

Also, I noted that your 1981 questionnaire was mailed on September 4th of that year and it called for numbers of locations and numbers of units operated "at present," which would be in the early fall of 1981, whereas your 1983 questionnaire called for 1981 data on machines and locations as of December 31, 1981. Again I believe that the differences in the numbers for 1981 as between the two surveys could not be the result of different dates. I think that the problem arises from the question of whether the two samples were representative of the industry. Changes in membership or member operations as between those in existence in the fall of 1981 and those who responded to the mid-1983 questionnaire could not possibly account for the different sample results. In other words, the differences in the characteristics as shown in Table 2 and Table 3 of the 1983 survey for the year 1981 as compared with similar data in the 1981 survey raise grave questions about the representativeness of the samples.

At the meeting in Washington I raised questions about the mean and the median of the data for December 31, 1982 in Table 3. There is a footnote dealing with the median indicating that some respondents gave details and others gave only totals. It seems to me that the same footnote would have to apply to the mean. More serious is the fact that it would be practically impossible for these averages to add up as they do in the lower half of Table 3 since there were different numbers of operators reporting on the different items. Yet your total of 535 for December 31, 1982 is the summation of the averages for each of the different types of machines. That is, you reported the sum of the means rather than the mean of the total.

I would therefore appreciate receiving from you the number of operators reporting for each of the types of machines listed in the lower part of Table 3 and also the absolute number of the machines reported by these operators. Clearly there were some respondents who gave only totals and others who provided breakdowns. If the figure of 535 in Column 1 represents merely an addition of the averages for each type of machine, then that summation would certainly be different from what would have been computed by dividing the total number of respondents into the number of machines reported by all of the respondents. The only way we could check on this factor would be to have the number of those who responded that they had jukeboxes and how many jukeboxes they had, as well as similar data for video games, other games, vending machines, other machines, and total machines. We would appreciate seeing this information so that we could check on these numbers.

I would appreciate it if you would indicate what the returns on net worth showed as distinguished from profits on market value. As I indicated at the meeting, reported market value is a subjective number. The questionnaire called for sufficient financial information to permit a ratio of profits to net worth.

You do show in your report the dollar amount of purchases of machines and records, but you do not show the number of units purchased. Why did you not request this information for machines and why did you not report the responses for records? Can you provide a frequency distribution of purchase amounts for both and number of units for records?

You requested in your questionnaire the percentage commission paid to locations. I assume this was tabulated and I would appreciate seeing a frequency distribution (by level of percentage) of the results.

Your questionnaire also asked for information on possible tax benefits from the Accelerated Cost Recovery System provision and from the depreciable asset provision of the Economic Recovery Act of 1981. Why did you omit this kind of information in your report? Can you provide us with a frequency array of these data?

We all understand that an extreme (or "outlier") response, particularly in a small sample, can distort the interpretation or meaningfulness of an average. For this reason, apparently, your report sometimes provides medians (or both medians and means), and some of the tables show the number of respondents to a question and the lowest and highest values reported. But this practice was not followed in all tables. To facilitate our understanding, it would be helpful if, for each question and each stratum, the total number of responses were available in a meaningful frequency distribution.

Of course, we would have preferred to receive, at our expense, a copy of your computer tapes so that we could tabulate the information ourselves. This request was made to and rejected by AMOA counsel.

I hope that you will be able to cooperate in sending this information so that we can be certain that there is common understanding about the data and so that differences in interpretation might be minimized. Thank you for your cooperation.

Sincerely,

Robert R. Nathan

April 25, 1984

Mr. Robert R. Nathan
Suite 900
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Nathan:

Thank you for your letter of inquiry concerning the 1981 and 1983 "Cost of Doing Business Surveys" (CDBS) which I prepared for the Amusement and Music Operators Association (AMOA). I appreciate the opportunity to further elaborate on certain items which were not clear to you or your staff in the report.

You stated in the second paragraph of your letter: "... no one knows the universe of operators we are trying to gather information about." We stated in the second sentence of the CDBS that "the survey was conducted to obtain data concerning trends and analysis... which could prove beneficial in evaluation of (AMOA) member needs and strengths." Further in the report we stated: "A total of 641 AMOA member operators were chosen for the survey..." Therefore the universe of operators is AMOA members. There was never an attempt to convey the impression that the report was for any organization (or universe) other than AMOA members.

The fact that the CDBS included only AMOA members does not, however, restrict its usefulness to the membership of that organization exclusively. The report is currently being used as one piece of evidence on the economic state of jukebox industry, which when taken together with other evidence, may present a picture of an industry in need of economic relief. As the report is being used in that context, we are using the AMOA members surveyed as surrogates for jukebox operators all over the country.

In any research or survey effort the problem of surrogation is an area of some controversy. The process of surrogation, however is virtually inevitable during the conduct of any such survey or survey research (as is used in many academic studies). The real question is: Are the surrogates basically comparable to the group to which we are attempting to draw generalizations. In this particular instance (as in similar survey research studies) it seems more acceptable to confine our generalizations to a more sophisiticated group than a less sophisiticated one. There seems to be little doubt that AMOA members:

(1) Are more likely to keep good reliable records from which data can be obtained than the average jukebox operators in the business;
and
(2) Are generally more successful than the average jukebox operator in the business.

Therefore, although you question the universe from which the sample is obtained, we can safely state that:
(1) The universe was AMOA members;
and
(2) If anything, we are probably overstating the profitability, etc., of the average or typical

> jukebox operator by using these numbers as surrogates for the entire jukebox operator population. Therefore, the real economic state of the jukebox industry in the United States is probably not as favorable as was portrayed in the AMOA Cost of Doing Business Survey.

In your letter you asked how many respondents answered each question. This information is provided for most of the tables in which financial and operating information is contained. The number of cases (or "n") column provides this data in Tables XI - MARKET VALUES and PURCHASES, XII - TOTAL REVENUE and PROFITS PER OPERATOR, XVI DEBT/EQUITY RELATIONSHIPS and XVII SALARY DATA. For example, in Table XII, the Profit-Total line shows a number of cases of "79", meaning that seventy-nine of the respondents provided usable data for that question. In table XIII, the number of cases is reported in the body of the report preceding the table:

Group 1 = 27
Group 2 = 25
Group 3 = 24
Total = 76

For demographic information contained in many of the other tables it did not seem to be useful or necessary to include the "n" figure, so it was not included in such things as presentations of number of employees, number of locations, etc.

As I am sure you noticed in the report, we were careful to present confidence intervals for many of the more sensitive financial tables. (Confidence intervals are, of course, statistical statements which describe the precision of the data being presented.) As you must know, the response rate is an integral part of the determination of confidence intervals, so although the specific number of respondents was presented in certain instances (Table XIV for example), a more precise extension was presented --- the confidence interval.

You asked: "What were the strata and how many AMOA members were in each stratum?" The strata sizes are given below.

Strata No.	Number of Machines
1	1-100
2	101-300
3	301-500
4	501-750
5	751-999
6	1,000+

The survey included a proportionate number of the total population from each strata. You may wish to contact AMOA to obtain the number of operators in each strata. They may consider that information confidential, therefore I would prefer not to give it you myself.

In the fourth paragraph of your letter you mention the fact that we checked for non-respondent bias. In our Washington meeting you mentioned your concern that there might have been a bias on the part of some of the population to not respond to the questionnaire. The purpose of this non-respondent bias test was explained in the first section of the CDBS report.

As we mentioned in the report, no completely definitive answer can be given to the question, however, this test is a generally accepted method of ascertaining whether there were any differences between those who responded initially to the questionnaire and those who responded only after a follow-up request for information. We tested such demographic items as machine composition as well as certain relevant items in the financial and operating section of the report. The SAS statistical package was used to perform appropriate statistical analysis (t-tests), and the results indicated no statistically significant differences between the two respondent groups. As stated previously, this is not to be construed as a complete assurance that those that did not respond had the same characteristics as those that did respond; however this non-respondent bias test is frequently used in academic studies in the way described above.

Several times in your letter you mentioned the comparison between the 1981 and 1983 report. It appears to me that in most instances the 1983 numbers follow very logically from the 1981 report. Listed below are several key variables which were reported in the 1983 report and in the 1981 report.

	1983 Report	1981 Report
Median Number of Machines per Operator	347	367
Median Number of Locations per Operator	85	107
Respondents Reporting Number of Locations with only jukeboxes-Median	6	9
Respondents Reporting Number of Locations with only games-Median	31	25
Respondents Reporting Number of Locations with only jukeboxes and games-Median	41	46
Median percentage of locations with formal written contracts	12.5%	10.0%
Median Jukebox Market values reported	$65,000	$63,000
Median Jukebox Purchases Reported	$7,000	$6,000
Median Total Jukebox Revenue Reported	$44,000	$50,508
Median Revenue per jukebox reported	$968	$915
Median Profit per jukebox Reported	$77.33	$49.45

As you mentioned on the bottom of the third page of your letter: "We all understand that an extreme (or 'outlier') response... can distort the interpretation or meaningfulness of an average." This is why we reported both averages (means) and typical (medium) responses in the report. You will notice that I reported median responses above to allay the concern expressed on page three of your letter.

It is noteworthy that we did not make a direct comparison of 1983 and 1981 responses several times when such a comparison would have been more beneficial to our argument than the data as it was presented. For example, the 1981 and 1983 reports show the number of jukeboxes operated (median) declining from 56 to 33. Similarily, the 1981 and 1983 reports show the median number of locations per operator declining from 107 to 85. We did not report those declines, but rather we chose to ask the respondents to the 1983 survey to report those statistics for 1981, and we reported those numbers. (See Tables III and V). To re-emphasize, had we reported the numbers presented above the argument that the industry is in decline would have been strengthened. However, we felt that in the interest of a conservative presentation the data should be represented as it was in Tables III and V of the 1983 report.

You are correct that the questionnaire asked for ACRS data (although I do not understand the relationship of this data to the issue under consideration). The data which was received as a result of those questions did not appear to be useful to the members therefore, because of the length of the 1983 report, it was deleted.

You asked that I provide you with the high and low response for each question. You might notice that we reported Lower and Upper limits of confidence intervals several times in place of the high and low response. The reason that we did not report this type of statistic for every table is that it did not appear to be meaningful or relevant in every instance. If we had reported every possible parameter to every table, the report would have been so long and cluttered that, in my opinion, it would have hampered the usefulness of the report. As I remember the information which you requested on highs and lows is available, but it would be costly to obtain and (in my opinion) it would be of questionable benefit. If you will provide me with a more specific idea of which high and low amounts that you want, and the anticipated benefit of numbers, I will provide them to you upon the approval of AMOA.

The same thing is true for certain other of your requests (certain frequency distributions, etc.). Most of the data is available, however it would be time-consuming and very costly to re-run the data to your specifications.

Hopefully, some of the information contained in this letter will result in a letter of understanding of the data in the AMOA Cost of Doing Business Survey.

Sincerely,

James F. Gaertner, Ph.D., CPA

ROBERT R. NATHAN
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Comments on Dr. James F. Gaertner's response to Robert R. Nathan's request for further information on the AMOA survey.

Dr. Gaertner's letter dated April 25, 1984 but received only on May 14, failed to respond to most of the information requested in our letter of March 14, 1984. These comments briefly indicate the information requested for which no relevant or useful response was received, as well as some comments on Dr. Gaertner's letter.

1. We requested the total number of AMOA members from which the sample of 641 was drawn for the mailing of questionnaires. We also requested the distribution by strata (in terms of number of machines per member) of the total members of AMOA and the distribution of those in the sample as well as a distribution of all who responded showing separately the number who responded only after the second mailing. This kind of information is essential for determining the pattern of the AMOA universe and the representativeness of the sample to whom the questionnaires were sent, as well as to those who responded.

Dr. Gaertner did not provide any of this information. He did submit the range of machines per operator in each of the six strata. This is not at all helpful without the number of operators in each stratum. He indicated we may wish to contact AMOA to get the data, observing, however, that AMOA may consider such information confidential. It is not helpful to arrive at judgments on such a survey without access to this kind of information. There certainly seems to be no basis for its being withheld on grounds of confidentiality. No information about individual operators was requested.

2. In our letter we did not even remotely imply that AMOA could or should try to supply information on the entire

jukebox industry. Instead of providing the kind of information which would permit us to evaluate the reliability of the survey, Dr. Gaertner entered into an extended discussion of the usefulness of the results as a surrogate for all jukebox operators. He proceeded to say that the AMOA member survey probably overstates the profitability of the entire industry because the AMOA members would likely have more reliable records and be more successful and also more sophisticated than the non-member jukebox operators. Dr. Gaertner states in his letter "we can safely state that:...If anything we are probably overstating the profitability, etc, of the average or typical jukebox operator by using these numbers as surrogates for the entire jukebox operator population." There is no basis whatsoever for this conclusion.

In fact, there is at least as great a likelihood that the "sophistication" of the AMOA members would result in understating profitability, especially in view of the fact that the letter accompanying the questionnaire referred to the usefulness of the results for legislative purposes. The AMOA members are surely aware of the intensive efforts of AMOA to bring about a reduction in the royalty rate per jukebox established by the Copyright Royalty Tribunal after long and comprehensive hearings. It would be in their interest to report how impoverished they are.

3. In response to our request for the computer tapes which we would tabulate at our own expense, which was rejected by AMOA counsel, Dr. Gaertner concludes that:

> Most of the data is available, however it would be time-consuming and very costly to re-run the data to your specifications.

We would still be very willing to engage in these time consuming and costly re-runs.

4. In Dr. Gaertner's report on his survey he said that he had performed significance tests for "all relevant variables." We requested a list of these variables and the frequency distributions of the characteristics tested. The confidence intervals cannot be checked without specific numbers of responses. Certainly it is impossible to check the information on the

"means" in Table III of his June 1983 report. Merely to state, as Dr. Gaertner does, that he was careful to present the number of responses for many of the more sensitive of the financial tables is not an adequate answer to requests for such numbers in all the tables. It should have been quite simple, and without any re-runs, to have given us the specific number of responses for every table.

5. We raised serious questions about the results of Table III where the average machines per operator for all operators appeared to be the result of simply adding up the means of sub-groups to arrive at an average for all operators. No information was forthcoming from Dr. Gaertner with respect to this significant manifestation of improper use of data.

6. We requested data on profits in relation to net worth. Dr. Gaertner's figures on profits as a percent of the market value of the assets are not very meaningful. Having discussed at the meeting in Washington the subjective nature of "market value" as spelled out in the questionnaire, it is clear that the data on profits in relation to net worth should have been revealed. Dr. Gaertner did not respond to our request for data on net worth.

7. We requested information on the number of records purchased in addition to the dollar amounts. Also, we asked why the questionnaire included only dollar amounts for machines purchased rather than numbers. There was no response.

8. We requested a frequency distribution of commissions paid to locations in order to observe the patterns of division of jukebox revenues between operators and locations practiced by different operators. There were comments at the meetings that the commission rates vary considerably and that the share for locations may have been declining. Such information should have been available from the responses to the questionnaire. These facts are especially relevant since Dr. Gaertner reported only on the receipts of operators and not the total revenues taken from the jukeboxes.

9. We asked for information about tax benefits from ACRS and the depreciable asset provision of the Economic Recovery Act

of 1981. Dr. Gaertner replied that the data received did not appear to be useful to the members. It is difficult to interpret what was meant by "useful." If the survey was meant to provide useful information to members of AMOA rather than for legislative or regulatory purposes, the information on taxation impacts would seem highly relevant.

10. As noted in item 1 above, we requested information on the breakdown of the AMOA universe and the 641 operators to whom questionnaires were sent as well as the 93 who responded because of the importance of putting the results together into a meaningful total that hopefully might represent all of the AMOA membership. Dr. Gaertner stated in his letter that "The survey included a proportionate number of total population from each strata." We do not understand his use of the word "proportionate". If, for instance, the questionnaires were sent to one-fourth of the AMOA members, did Dr. Gaertner send questionnaires to one out of four operators in each size group? Did he weigh the answers in any manner? If, for example, the total number of AMOA members in the size group of 1,000 machines and over included only four operators and if the questionnaires were sent to one-fourth of all AMOA members, then only one among this largest category of operators would receive the questionnaire. It would be important to know whether that one operator submitted information. It would appear desirable to send questionnaires to a larger portion of those in the larger size categories and then to weight appropriately the results for each size group. Without such information we have no basis whatsoever to draw any judgment concerning the representativeness of the sample to whom questionnaires were sent or of the respondents.

11. The internal inconsistency of the numbers in Dr. Gaertner's report is clearly revealed in the following tabulation we prepared from his survey. This tabulation serves to demonstrate why Dr. Gaertner's results may be so dubious. This tabulation indicates that the average number of jukeboxes per operator was 100.3, whereas the survey report states that the average was 65 jukeboxes per operator:

Tabulation. Inferred Computation of the Average Number of Jukeboxes per Operator Compared to the Reported Average:

Revenue Per Operator		
1.	Number of respondents reporting:	33[a]
2.	Mean revenue per operator:	$ 91,897[a]
3.	Total operator jukebox revenues (item 1 x item 2):	$ 3,032,601
Revenue Per Machine		
4.	Mean operator revenue per jukebox machine:	916[a]
5.	Total operator jukebox revenues (item 3):	3,032,601
6.	Derived number of jukeboxes (item 5 ÷ item 4)	3,310.7
Average Number of Jukeboxes		
7.	Average number of jukeboxes per operator (item 6 ÷ item 1)	100.3
8.	Reported average number of jukeboxes per operator	65[b]

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[a] Source: 1983 AMOA Cost of Doing Business Survey, Table XII.

[b] Source: 1983 AMOA Cost of Doing Business Survey, Table III.

We indicated at the meeting in Washington where Dr. Gaertner presented the results of his survey that the mean number of jukeboxes appeared to be computed on the basis of total respondents rather than only those respondents who operate jukeboxes. It is possible that such an incorrect denominator may explain why the above tabulation shows so many more jukeboxes per operator than the number reported by Dr. Gaertner in his survey.

12. The issue which was perhaps most distressing was the substantial differences derived from the 1981 survey and the responses concerning 1981 derived from the 1983 survey. The variations in the averages are so great as to raise serious doubts about the representativeness of either or both of the surveys. Such divergent results raise doubts that go to the very core of representativeness of the samples. Dr. Gaertner states that when direct comparisons would have been beneficial to AMOA's argument he did not make such comparisons. It is not a question of whether the results were favorable or unfavorable to jukebox operators or to the copyright owners. The issue goes to the question of reliability of the results. When the median number of jukeboxes operated varies from 56 to 33 as between two surveys referring to approximately the same

time, questions have to be raised about the reliability of the results. What needs to be done is to analyze very carefully and very thoroughly every bit of information about the characteristics of the sample in each of the surveys and to look at averages and medians and numbers of returns and numbers reporting on specific items and other evaluations which could shed light on the relative and absolute representativeness of the samples. There is no evidence that such probes were undertaken. We could and would perform that task if we had access to the computer tapes. Or it could be done by a neutral research entity in or out of the government.

Dr. Gaertner's letter failed totally to respond to our concern about the differences between the 1981 and 1983 reports. We were mainly concerned because the results in the 1981 report were vastly different from the results responding to data for 1981 in the 1983 survey. Dr. Gaertner in his letter states, "Several times in your letter you mention the comparison between the 1981 and 1983 reports. It appears to me that in most instances the 1983 numbers follow very logically from the 1981 report." He then proceeds to make some comparisons between the report covering 1981 and the report covering 1983. He does not provide any comparisons for 1981 as revealed in the 1981 report and the 1981 results derived from the 1983 survey. Also, he deals with medians only and fails to show the even greater differences in the means. Clearly the figures for the data on 1981 taken from the two reports raise grave doubts about the representativeness of the samples and responses in either or both reports.

We must continue to express grave doubts about the meaningfulness of the information given the wide ranges of the results supposedly covering the same period but based on surveys taken at different times.

13. In general, the replies to our letter of March 24th in Dr. Gaertner's letter dated April 25 are not sufficiently relevant to warrant further pursuit of clarification and detailed information which would provide sound bases for a much more revealing set of results concerning the reliability and usefulness of the data in the two AMOA surveys conducted by Dr. Gaertner, unless, of course, we were to be given access to the computer tapes.

Senator **Mathias**. Mr. Cramer?

STATEMENT OF EDWARD M. CRAMER

Mr. **Cramer**. My name is Edward Cramer. I am president of Broadcast Music, Inc., known as BMI. I am accompanied by Governor Peabody as counsel. Also here is Mark James, a very distinguished songwriter from Nashville who last year had the No. 1 song, the Willie Nelson song "Always on my Mind," and I noticed as I was coming in that there is another very distinguished songwriter along with Mr. David, George David Weiss, in the room, who was just this year elected to the songwriters' hall of fame.

I specifically request that my statement be included in the record, but I would like to depart orally, from that statement. I think it will be shorter, and perhaps the language will be a little stronger.

Senator **Mathias**. As I have already indicated, the full statements will be included in the record.

Mr. **Cramer**. I think that the proponents' actions here have been unconscionable. That is a strong word, but there have been continuous, massive violations of the copyright law by jukebox proprietors from the day the law was enacted.

Now, they come before Congress and ask this committee to be rewarded for their past transgressions. It is not the current $50 annual fee that caused them not to file. When this law was enacted, the annual fee was $8, and it is estimated that perhaps as much as 75 percent of the boxes were in noncompliance, again at an $8 a box fee. This was willful infringement.

Even today, after belated last-minute efforts to clean up their act, a representative of the jukebox industry recently said to us that as much as 50 percent of the industry complied. That means that 50 percent of the industry is in noncompliance today.

I think the only amendments to the act that would be warranted in light of the experience are amendments that would put some teeth in the compliance provisions. But that is not before you now.

Now, I turn to the bill itself, and I would like to correct what I think is a misunderstanding. I think Senator D'Amato mentioned it. It is not a $50 annual payment. That is for new boxes only. It is $25 a year for used boxes, and that $25 is a maximum which will be prorated over the life of the box.

I suggest to you that there will be a big business in used jukeboxes if this act ever goes through. There will never be another new one made.

Now, they have the burden of showing over the past 5 years that it has been this legislation that has hurt them. One of their own studies has shown to the contrary and Mr. Lawson, who appeared here today supplied the data. The data shows that the claimed increase in costs since the act was $7 a box a week, and you know how much of that $7 a box a week was attributed to the copyright fees, according to Mr. Lawson's own statement? Just 37 cents of this $7.

The other costs were far greater—labor, services, record costs—but no effort is made to reduce these other costs. Only one group is asked to pick up this slack, that 37 cents, and that is the songwriter and the publisher.

If this is a sick industry and should be saved, should be bailed out, then who should bail it out? Maybe it should be saved. I am all for saving it. I grew up with jukeboxes in the forties and the late thirties. That was our activity. I am from a small town, too, 4,000 people. That was jukebox Saturday night.

I think the jukeboxes deserve to stay, but the question is, Who bails them out? Is it the songwriter and the publishers with their 37 cents a week, or maybe there is some other legislation that should save them. Maybe there should be special tax incentives. Maybe the period in which they can be depreciated should be changed. Maybe there is something else, but I submit that it is not the writer and not the publisher who, by their small amount, can save this industry, nor should they, alone, be asked to save it.

The present rate is less than a single jukebox play a day. I submit to you again that if the industry should be saved, and I am all for legislation to save the industry, don't take it out of the pockets of those who can least afford to pay for it.

Thank you.

Senator Mathias. Thank you.

[Material submitted for the record follows:]

Prepared Statement of Edward M. Cramer

For many years, and quite paradoxically, the United States was the world's only major country with copyright laws in which jukebox operators were permitted to use copyrighted musical property without either permission or payment. In 1976, however, after extensive debate and compromise, a U.S. jukebox copyright license system was finally established. Subsequently, after full and fair hearings as well as a court challenge resulting in its decision being upheld, the Copyright Royalty Tribunal established a phased-in $50 per-box annual fee -- modest by comparison to the fees paid in most countries.

Now the jukebox industry proposes that the compromises and proceedings in which it joined be replaced with a small one-time license fee. The industry was given its day in court but the decision was not to its liking. Now it is trying to enlist your aid in an attempt to subvert that decision. As we consider this proposal, it is important to note its source. In the half dozen or so years since the jukebox copyright decision was first put in place the simple fact is that most jukeboxes are being operated outside the law. In 1982 the Register of Copyrights formally urged the Department of Justice to bring criminal copyright infringement suits against large jukebox operators, in order to curtail the "existing massive non-compliance with the Copyright Act by jukebox operators." By our estimate, that "non-compliance" is about 75% of the industry. Even the Amusement Machine Operators of America (AMOA) has admitted that as many as half of all jukeboxes are not - even today - registered in compliance with the law. In a recent article in the West Palm Beach Post, Mr. Manley Lawson, the son and business partner of former AMOA president Wesley Lawson, is stated to have said that most jukebox owners do not pay the copyright license fee, because they think it is a "ripoff."

Although we have no access to census data on jukeboxes, BMI and the other performing rights organizations are uniquely positioned to observe compliance and non-compliance among jukebox operators. It is one of BMI's functions to protect the rights of our member composers and lyricists by bringing civil infringement actions against operators who refuse to obey the copyright law. We bring literally hundreds of such actions every year. Unfortunately, we have only been able to make a small dent in the problem. The actions are costly to bring, and we simply cannot keep up with the huge number of operators who refuse to comply with the law. It is particularly frustrating, I might add, that despite our best efforts to obtain enforcement, we have seen no improvement in compliance rates over time. Indeed, we believe that the decline in the number of jukeboxes registered with the Copyright Office since 1977 -- which the industry cites as evidence of its declining health -- is actually a reflection of an increasing rate of non-compliance with the copyright law.

We believe that Congress could do much to put teeth into the enforcement aspects of the copyright law applicable to jukeboxes. Unfortunately, that is neither the intent nor effect of Senate Bill 1734. In fact, by eliminating the license certificate requirement, the bill would make it effectively impossible for copyright owners to determine whether a particular box had ever paid any of the fees rightfully due to the creators of music.

As proponents of the "jukebox bail-out bill," the members of the jukebox industry appropriately bear the burden of justifying their call for Congressional action. The justification most frequently offered is the claim that the industry is in economic peril and that the jukebox fee is putting many operators out of business. A reasoned examination of the economic issue requires that the following questions be addressed:

1. Is the economic condition of the jukebox industry so grave that, unless it receives legislative assistance, the industry faces extinction?

2. To what extent is the copyright royalty fee a cause of the jukebox industry's distress?
3. Assuming that the industry is significantly distressed, is the jukebox so valuable that legislative action is warranted to rescue or subsidize it?
4. Who should bear the burden of such a subsidy or bailout?

We believe that the evidence regarding the first question -- the economic condition of the industry -- is at most inconclusive. In their lobbying campaign, the operators have relied heavily upon a report interpreting results of two AMOA surveys of jukebox operators, which collected information for 1980 and 1982. We have serious doubts about the objectivity, methodology, and reliability of this report. Accepting for the moment the validity of the AMOA surveys, however, much of the data reported stands in stark contrast to the cries of industry-wide doom uttered by the jukebox operators. The following is taken strictly from the AMOA surveys:

- Average annual profit per jukebox in 1982 was $130.86, compared to $72.58 in 1980. This 81% increase in profitability took place at the same time the copyright fee was being phased in.
- On a per-operator basis, this translates to average profits from jukebox operations of $5,298.34 in 1980 and $8,505.90 in 1982 -- a 60% increase!
- According to the AMOA surveys, the average operator spent $15,457 on new jukeboxes in 1980 and $18,076 in 1982, a 16.3% increase.

These facts are simply not consistent with the jukebox industry's claim that it is in severe economic decline.

The second question -- whether the copyright license is the cause of the jukebox industry's purported distress -- is one which can be answered only by comparing the various items which make up the operating costs of a jukebox. Former AMOA president Wes Lawson, of the Lawson Music Co., Inc., has recently provided useful data on this subject, reproduced in Table I.

TABLE I

WEEKLY PER-JUKEBOX OPERATING COSTS

Lawson Music Co., Inc.

Cost Item	1979	1980	1981	1982	1983	Change 1979-1983
Copyright License	0.13	0.16	0.16	0.50	0.50	+ 0.37
Records	1.70	2.13	2.49	2.83	2.75	+ 1.05
Maintenance	6.18	6.80	6.97	7.56	9.16	+ 2.98
Fixed Costs	2.88	2.75	3.01	3.50	4.64	+ 1.76
Depreciation	2.32	3.48	3.59	3.05	3.12	+ 0.80
Total Operation Costs	13.21	15.32	16.22	17.44	20.17	+ 6.96
No. of Jukeboxes in Operation	395	370	350	334	325	- 70

As you can see, Lawson's weekly operating costs per box rose by $6.96 during 1979-1983, but only 37¢ of this was due to increased copyright fees! Although the copyright license fees increased to approximately $1.00 per week ($50.00 per year) in 1984, this will represent less than 5% of Lawson's total operating costs, even if no other cost items increase. In short, Mr. Lawson's figures show that the modest fee he pays for the only product he resells (about the price of one play per day on a jukebox) is the smallest factor in the "profit squeeze" he has experienced. Of particular significance, also, is the fact now that the new license fee "phase-in" period is now complete. Thus, Lawson's copyright costs are guaranteed to increase no faster than the rate of inflation through 1990, when the Copyright Royalty Tribunal is scheduled to reconsider the jukebox rate. The Lawson Music Co. has no such assurances about any other of its operational costs.

Most importantly, however, the industry's often repeated claim that the copyright royalty is putting them out of business must be considered in light of one central fact: most operators did not pay the fee when it was $8.00; even fewer are paying it today! How then can they argue that they are being destroyed by laws which they have callously and en masse put themselves above?

Setting aside for the moment any skepticism we may have about the claim of economic distress in the jukebox industry, let us consider the third issue raised by the jukebox industry's request for relief. Assuming that the business is indeed suffering, is it one which should be saved by some form of governmental intervention? We are sympathetic toward any businessmen who are experiencing hard times. Nevertheless, time and again, industries have been harmed by inevitable changes in technology, culture, and social habits. It is the difficult task of Congress to draw the line between those who should be rescued by government intervention and those who should not. Should the manufacturers of buggy whips have been subsidized by the taxpayer or even by a particular segment of taxpayers? Congress' answer was obviously no. Should the Lockheed Corporation have been rescued? Congress' decision was yes.

There is another example which is even more closely analogous to the present difficulties of the jukebox operators. Beginning about 1948, the manufacturers of 78 RPM records (which are made of shellac) were threatened with extinction because of the development of vinyl 45's and long-playing 33's. There were many small manufacturers or pressing plants whose business, I am sure, was seriously disrupted because of these changes. At that time the compulsory license for records (mechanicals) was 2 cents. To the best of my knowledge, and I was in active law practice in the early 1950's representing record companies, there was no move to amend the copyright law to require the manufacturers of 78's to pay less than the statutory rate because they were suffering from the new type of records. Had there been any such proposal I am confident it would not have received serious consideration.

I want to make it very clear that BMI does not believe that the jukebox should go the way of the shellac record or the buggy whip. We think that jukeboxes will continue to be an important source of entertainment for many people, as well as a major attraction increasing the profitability of restaurants, taverns, amusement games, and other business ventures. On these points, I am sure that BMI and the jukebox operators are in agreement. If the industry can meet its burden of establishing that it is truly in economic peril, then it is our position that it should receive assistance. This brings us to the fourth economic inquiry: who should bear the burden of such a subsidy or bailout?

A basic flaw in the legislation proposed by the jukebox operators is that they seek to place the entire burden for providing relief upon the writers and publishers of the music they use. We have already seen from the jukebox industry's own cost data that the recent increase in copyright fees during the phase-in period was insignificant relative to increases in other costs of jukebox operations. It should be clear that, if the jukebox industry is in distress, it is not because of the small price it pays for copyrighted music.

Frankly, it defies all common sense to say that a truly distressed industry can be saved by so small and insignificant a change. If the industry really is in trouble, then it needs more help than relief only from the modest copyright license fee. Perhaps the answer lies in granting the jukebox operators and manufacturers certain tax incentives. Perhaps the answer is that the traditional split of 50/50 between jukebox operators and location owners should be adjusted so that the operator's share is larger. Perhaps the answer lies in a new copyright payment system based upon on a percentage of revenue, similar to the method used in virtually every other copyright user industry. In any event, to single out the writers and publishers of music among all providers of goods and services to the jukebox industry to carry the entire burden of subsidizing that industry is not only unfair; it is indecent!

QUESTIONS AND ANSWERS

QUESTION FROM SENATOR MATHIAS

At the hearing on June 20, all of the witnesses agreed that non-compliance with the current system of jukebox royalty payments is a very substantial problem. Several witnesses suggested alternative methods of collecting jukebox royalties as a way to increase compliance or to improve the equity of the collection system. I would appreciate your comments about both the practicability and the fairness of each of these proposals. The three proposed methods are as follows:

(1) Inclusion of a "performance right fee" in the price of recordings used in jukeboxes. (Obviously, some method would need to be found to avoid imposing this fee on non-commercial purchasers of recordings.)

(2) Imposition of a one-time royalty fee on jukeboxes, paid by the manufacturer or purchaser. This one-time fee would amount to a payment in advance of the annual fees now paid by jukebox operators. (S. 1734 proposes such a fee, but the amount of that fee could be different than that proposed in S. 1734.) This fee could be fixed permanently, or adjusted from time to time by a federal agency or by Congress.

(3) A pay-per-use system, in which jukebox operators would compensate songwriters based on the number of times that a jukebox is actually used.

QUESTIONS FROM SENATOR ZORINSKY

(1) Do you support overturning the Supreme Court decision in the Sony Betamax case? If so, do you support Senator Mathias' bill for a one-time copyright fee on those machines?

(2) How much of the 4½ million dollars collected so far this year will your organization receive? What is the average amount paid to an artist?

QUESTIONS FROM SENATOR HATCH

(1) One of the other witnesses at the June 20 hearing stated that performing rights organizations such as yours have sued jukebox owners for more than $2,000 for a failure to pay a $25 to $50 fee. Would you comment on these charges, and more generally on your procedures for enforcing your rights under the jukebox copyright provisions?

(2) Senator Zorinsky commented at the June 20 hearing that songwriters benefit tremendously from the exposure that they get by having their songs played on jukeboxes, and that as a result jukebox royalty fees should be kept low. Do you agree with that comment?

(3) The number of jukeboxes registered with the Copyright Office has declined each year since 1979. Does this decline show that royalty fees are contributing to a shrinking of the jukebox industry?

(4) Assuming that the Committee agrees with you that we should retain a system of continuing payments for continuing performances, would you consider a reduction in the annual royalty fee to reduce the burden on the jukebox industry?

ANSWERS FROM BMI

BROADCAST MUSIC, INC.,
New York, NY, August 1, 1984.

Hon. CHARLES McC. MATHIAS, Jr.,
Chairman, Subcommittee on Patents, Copyrights and Trademarks, U.S. Senate, Washington, DC.

DEAR SENATOR MATHIAS: We are pleased to respond to your letter of July 16, 1984 attaching your questions, as well as questions submitted by Senators Zorinsky and Hatch. Our responses are set forth below.

A. RESPONSES TO QUESTIONS FROM SENATOR MATHIAS

(1) The inclusion of a performance right fee in the price of recordings used in jukeboxes would be unworkable. As your statement recognizes, the fee would have to be applied only to recordings used on jukeboxes. We believe that it would be impossible to separate out such sales or prevent jukebox operators from purchasing non-fee recordings from other sources. The proposal would also require detailed

sales or purchase data, itself and administrative nightmare. For these reasons, BMI would oppose the proposal.

(2) As BMI indicated in its written and oral statements, we oppose the idea of a one-time fee.

(3) BMI believes that this proposal is fair and equitable and deserves serious consideration. Jukebox operators presently pay location owners a percentage of individual box income. A similar system applied to copyright fees would merely be an extension of what is already an accepted industry practice. If they do not already exist, current technology should permit the development of relatively simple systems to measure the number of performances per jukebox.

B. RESPONSES TO QUESTIONS FROM SENATOR ZORINSKY

(1) BMI would support overturning the Supreme Court decision in the Betamax case. The proposed one-time fee may be a practical means to compensate copyright owners for home recording rights. A parallel, however, cannot be drawn to performing rights, the subject of the jukebox fee. Jukebox operators are in the business of presenting copyrighted works to the public for profit. Writers and publishers are entitled to a continuing share of the profitable use of their work by others.

(2) BMI's share of jukebox license fees is determined by a formula established in a proprietary agreement with ASCAP and SESAC pursuant to S116(c)2 of the Copyright Act. BMI writers and publishers will receive approximately 85 percent of the BMI share.

C. RESPONSES TO QUESTIONS FROM SENATOR HATCH

(1) The minimum statutory damages under the copyright law, per infringement, is $250. (Each performance of a musical work in the absence of a license is an infringement.) In instances where BMI believes there is copyright infringement, an individual is dispatched to log performances. Research is then undertaken to determine whether, in fact, works in BMI repertory have been performed on an unlicensed jukebox. Our normal practice is to then notify the alleged infringer before commencing legal action and, if possible, reach an agreement requiring the jukebox owner to comply with the law. Only in instances where jukebox owners resist agreement is legal action brought. The legal and administrative costs involved in proving infringement in court are considerable. BMI, therefore does not make a profit from its infringement actions nor is that their purpose. Jukebox infringement suits are brought solely to encourage compliance.

(2) For the most part, jukebox performances reflect, rather than influence, the popularity of the copyrighted product. The whole notion of public exposure is, however, irrelevant. Jukebox owners utilize the copyrighted property of others for profit and must be required to pay a fair, ongoing, rate for doing so. No one suggests that operators should pay less than fair market value for any other commodities or services they must buy in the course of business. Their most important commodity—the music itself—should be no exception.

(3) The license fee is a very small percentage of jukebox industry costs, less than 25 cents per day per box, or about one play. The decline in license registration is more likely to be the result of non-compliance rather than the effect of an industry-wide depression due, as has been alleged, to a miniscule license fee.

(4) Data submitted by former AMOA president Wes Lawson of the Lawson Music Co., Inc. shows that during the period 1979-1983, operating costs per jukebox increased $6.96; but only 5 percent—or 37 cents—of this was due to increased copyright fees. It seems unjust, therefore, to single out only the one group that contributes least to the problem—the writers and publishers of muisic—and expect them to provide a solution that will "bail out" an entire industry.

I hope this fully responds to the questions. I would be pleased to provide any additional information you may require.

Sincerely,

EDWARD M. CRAMER.

Senator MATHIAS. Mr. Candilora.

STATEMENT OF VINCENT CANDILORA

Mr. CANDILORA. Mr. Chairman, my name is Vincent Candilora. I am the executive vice president of SESAC, Inc. With me is our house counsel, Nicholas Arcomano.

We have all listened to quite a bit of material concerning S. 1734. An overwhelming amount of these statements has dealt with the history of the law, has dealt with the economics, and we are obligated to consider the contribution a songwriter makes to society and the importance music has on people.

You know, as the pace of our society continues to increase with the growing demand of high technology, we are developing into a digital and informational society. In doing so, we increase our needs to be in touch with our own human emotions.

I don't think we fully realize just how music affects each and every one of us. When a person places a coin in a jukebox, what are they buying? Yes, they are buying a performance of music. I have worked 16 years for a performing rights organization. That was the immediate response that came to my mind, but being a user of jukeboxes for years—still am—I tried to look beyond that point and realize what they are really buying.

I believe a person is really buying an emotional exchange that they need. They feel they need it to make them feel happy at a time when they aren't, where a song like "Raindrops Keep Falling on My Head," and in the verse they want to hear as "the blues they sent to meet me won't defeat me," that type of emotional exchange. That comes from a songwriter. That doesn't come just via the speaker, just the diamond needle, just the box, just the buttons on the box. That comes from someone else creating a property that another person has a need to hear. I think that if we are going to look at this issue, we cannot ignore the effects that music has on society.

There are other songwriters who haven't written songs like "Raindrops," or the songs that George David Weiss has written. I don't know how many quarters, or dimes, or whatever the rate was at the time, of Elvis Presley's recording "I Can't Help Falling in Love With You" were placed in machines, for which Weiss did not receive any money whatsoever.

There is a young composer that SESAC represents. The music he composes expresses his love for his country. He is a great young American composer. In 1975, he testified along with another great American composer, Aaron Copland, in the congressional subcommittee hearings on June 3, 1975.

The song that he wrote, "Convoy," which was a song that was considered a novelty tune, but it was a song that was written about people where he grew up, where he lived as a person, once again an emotional exchange. That song really was an artistic and romantic view of what has been termed the last American cowboy, the American trucker.

We all take for granted in this great country of ours that the milk, the bread and all the other needs will be there every morning. The song "Convoy" was a salute to the truckers. When they parked their trucks and went into the diners to eat, they went over to that jukebox, what do you think they wanted to hear? They put that coin in, and "Convoy" was the top pop record, country record, of the year.

This year, Chip Davis, after testifying, learns that his own Senator—the constituent lives in Omaha, Senator Zorinsky, has introduced this legislation, S. 1734, that will not only hurt his livelihood but, more importantly, totally ignores his views on this very issue, which he himself expressed in front of Chairman Kastenmeier's subcommittee on June 3, 1975.

I feel that we have an obligation to our system, and unless this system works, we had better be aware of the fact that it doesn't.

Thank you, Mr. Chairman.

Senator Mathias. Thank you, Mr. Candilora.

[Material submitted for the record follows:]

PREPARED STATEMENT OF SESAC, INC.

Submitted by Vincent Candilora

SESAC, Inc. wishes to extend its appreciation to Senator Charles McC. Mathias, Jr., Chairman of the Judiciary Subcommittee of Patents, Copyrights and Trademarks for this opportunity to present this statement in opposition to Bill S. 1734 to amend title 17 of the U.S. Code with respect to public performances of non-dramatic musical works by means of coin-operated phonorecord players.

SESAC, Inc. founded in 1931 and one of the three major music performing rights licensing organizations in the U.S., strongly opposes the enactment of S. 1734, the "Coin-Operated Record Player Act of 1983" which calls for a one-time buy-out fee of $50 per jukebox.

THE 1976 COPYRIGHT ACT AND THE JUKEBOX COMPROMISE

The proposed legislation is an attempt to override the careful compromise arrived at by Congress set forth in Section 116 of the Copyright Act of 1976, which provides for an annual compulsory license fee to be paid by jukebox operators for the performance of music each year, subject to review and adjustment by the Copyright Royalty Tribunal (CRT). This compromise resulted from long, extensive hearings during the copyright revision process where all interested parties had the opportunity to present their positions and did so.

SESAC was very active in efforts to secure the revision of the Copyright Law throughout the 1960s and the early 1970s. One of our major concerns was the elimination of the anomalous and inequitable "jukebox exemption" under the 1909 Copyright Act. Both the Senate and the House Judiciary Committees agreed that the exemption should not be continued and stated so in their reports (S. Report No. 94-473, 94th Cong. 96(1975); H. Rep. No. 94-1476, 94th Cong., 21 Sess., 113 (1976) which read, in part, as follows...

> "Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoys any exemption."

Why should one group of commercial users, who for years paid no fee for the use of music, now be absolved from paying a continuing royalty each year for continuous performances of music, when none of the other commercial users enjoys such treatment?

THE SENATE JUDICIARY COMMITTEE AND THE COMPULSORY LICENSE FEE

The compulsory annual license fee resulted from the fact that jukebox operators opposed free-marketplace negotiations with the performing rights organizations. Indeed, in the hearings before the House of Representatives Judiciary Committee on June 3, 1975, SESAC (along with its witness, a composer constitutent of Senator Zorinsky who introduced this bill) expressed its position that if there were to be a fixed compulsory license rate for jukeboxes, (rather than a fee determined by free marketplace negotiations) then there was no reason whatsoever for not having that rate subject to review and adjustment by the CRT. When the initial $8.00 annual fee per box was arrived at, it was acknowledged by Congress to be low and unrelated to any economic facts and that a higher fee would be proper. In fact, in 1958, the Senate Judiciary Committee had recommended an annual per jukebox payment of $19.07. The Senate Judiciary Committee stated in its report No. 94-473, 1975...

> "In providing in this legislation for a total payment of $8.00 per box, the committee has been greatly influenced by the desire to conform to the rate provided in the copyright legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, the committee has endeavored to facilitate the progress of this legislation by preserving, to the extent possible in view of the other provisions of this bill, the rate adopted by the House of Representatives."

The Senate Report (p.99) went on to state that:

> "This committee has accepted the $8.00 jukebox royalty in the expectation that it would be subject to periodic review. If such a review is to be precluded, the committee recommends that the royalty rate be now adjusted to provide a payment which is reasonable under existing conditions."

In addition, during the debate in the Senate on the copyright revision bill, the jukebox operators attempted to amend the bill so that the $8 fee would be frozen permanently. The law, as passed, did not prescribe such a special advantage for jukebox operators - but made the fee subject to review and adjustment by the CRT - first in 1980, and every ten years thereafter. This was in accordance with the recognition by the Senate Judiciary Committee that:

> "The most appropriate basis for compulsory license is a statutory per box fee, with a mechanism for periodic review and adjustment of the per box fee. Such a mechanism is afforded by the Copyright Royalty Tribunal."
> (S. Rep. No. 94-473, 1975)

PROPOSED LEGISLATION OVERRIDES U.S. COURT OF APPEALS DECISION

In accordance with the new Copyright Law, the CRT reviewed and adjusted the annual rate in 1980. The proposed legislation is also an attempt to override the 1) determination of the CRT in adjusting the low annual fee of $8 per jukebox to a meaningful, realistic level - one that assures copyright owners a fair return for their creative efforts - phased in over a period of time to minimize any disruptive impact on the industry ($8 maintained for 1981, $25 for 1982-1983; $50 for 1984-1986 and $50 with an adjustment for inflation for 1987-1990) and 2) decision of the United States Court of Appeals for the Seventh Circuit, Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F. 2d 1144 (7th Cir. 1982), upholding the CRT's determination made after that Court had reviewed the legislative history, the statutory guidelines and The Administrative Procedure Act. The Court in reaffirming the CRT's decision, stated:

> "Ratemaking is an art, not a science. We believe that the Tribunal did not act either unreasonably or unlawfully by establishing a $50.00 royalty fee which would be implemented in stages and be subject to future inflationary adjustments ... In summary, we find no fault with the Tribunal's final rule as promulgated." (676 F. 2d 1159).

Furthermore, the Supreme Court refused the Amusement and Music Operators Association's (AMOA) petition for review of the Circuit Court's decision.

It should be noted that before the CRT's determination was made, the CRT held hearings at which the three performing rights organizations, representing copyrights owners, and the AMOA representing jukebox operators, had the opportunity to present their views. The CRT found that...

> "The case presented by the AMOA including the industry survey, has failed to provide reliable data concerning the operating expenses, revenues or return on investment of jukebox operators." (46 FR 888).

Clearly, the new rate would not have any disruptive impact on the jukebox operators. It would not prevent them from deriving a fair income under existing economic conditions. In essence, a balance was arrived at, through compromise, in the new Copyright Act. There is no basis for disturbing the decision of the Court through the radical procedure of a one-time buy out.

THE JUKEBOX/"COIN MACHINE" INDUSTRY

An essential fact must not be overlooked: this industry of users relies on music on a daily basis, year in, year out: for every coin placed in a jukebox, music comes out, not as a by-product, but as the only product. We have not been provided with any convincing information that should require that these users of music be afforded different treatment than other users: treatment that would place the creators of music in the position of subsidizing an entire industry. And we ask, why should this Congress be placed in the position of endorsing the concept of a "one-time buy-out of performance rights - a fee "fixed" for all time? There is no compelling economic reason to do so. And there is no compelling reason affecting the public interest to do so. Rather we submit to the members of this subcommittee that Congress recognize the underlying weakness of claims made by the jukebox industry and uphold the rights of composers and authors of music. Rights which have been clearly recognized through the enactment of Section 116 of the Copyright Act of 1976 within the fundamental framework provided by the U.S. Constitution.

Let us briefly examine the claims of the jukebox industry. The first claim relates to economic hardship. Granted, it is true that in just about every area of industrial and cultural enterprise there may be, even in the best of times, isolated instances of economic stress, and certainly, some type of relief may be warranted in such instances. However, when examining the economic condition of the jukebox industry to the extent that is possible in a "cash business", and to fully understand and appreciate any impact of the adjusted annual phased-in-rate of $50, it is necessary to look at the economic relationship of the "jukebox industry" within the context of the larger "coin-machine" industry, an industry that encompasses video-games, pinball machines, vending machines and of course, jukeboxes.

When jukebox operators provide jukeboxes to location owners, other machines are usually placed in the same location. Thus, the jukebox generates revenues; it brings in business for the other machines. The operator often pays the location owner for allowing the installation. In addition, it has been reported that 50% of the gross revenues from jukeboxes inure to the location owner, as profit. Further, the location owners customarily pay half and sometimes all of the compulsory license fee. The nature of the coin-machine business is a cash one-this leads to substantial understating of gross revenues. The fact remains that the jukebox is merely one segment of a highly profitable coin-machine operated industry and as such serves a commercial profit- fulfilling function for the industry as a whole.

There is nothing new in the industry's claim of hardship. But how can a fee of $50 per year for the cost of performing music - less than 14¢ a day be a burden to users whose sole product is music? How does that cost compare with other costs that an operator has in the conduct of his business: for maintainance and labor? Are those costs stationary, are they "frozen" at one level for all time? Obviously not. Have they not increased since 1978?

The AMOA's 1983 Cost of Doing Business Survey, which the AMOA claims establishes proof of economic hardship for the jukebox industry suffers from certain flaws. The response to the survey was extremely low. Only 93 of the 641 AMOA members responded to the survey and only 33 members out of the 93 member responses provided information concerning per jukebox income figures. It would appear unlikely that this small number of respondents is representative of the approximately 10,000 operators.

In addition, the most financially and successful operators may be less likely to respond to sensitive questions concerning revenue from jukebox operations. Therefore, the responses to the survey should not be generalized to the industry as a whole. Furthermore, the survey indicated that the average annual profit per jukebox increased over 80% from $72.58 in the 1981 AMOA survey to $130.86 in the 1983 survey.

COMPLIANCE WITH THE LAW

There has been substantial non-compliance by jukebox operators in registering boxes with the U.S. Copyright Office. The information provided by the U.S. Copyright Office shows that registration has declined substantially from 145,535 registrations in 1978 to 103,173 in 1983. The jukebox operator would like to have Congress believe that they cannot now afford to comply with the law and that compliance is administratively burdensome. It is not. Compliance is a relatively simple procedure: file an application, pay a fee and affix a certificate on the jukebox. The proposed legislation would do away with the requirement for a certificate on the jukebox and make non-compliance an attractive option. Yet, even when the rate was $8 per year, the 145,535 registrations represented at the most a 50% compliance. The reason given for non-compliance is without foundation. Congress has determined the necessity of payment for performances on jukeboxes.

A greater compliance could be secured through letters forwarded by the performing rights licensing organizations to proprietors of establishments requesting the names of the operators of the phonorecord player. This would be followed up by infringement actions when necessary against the operators and/or the proprietor who refuse to identify the jukebox operator. The Copyright Law contains the means of securing greater compliance.

THE MARKETPLACE ANALOGY

Indeed, in making a determination as to a reasonable rate, the CRT reviewed marketplace analogies presented by ASCAP and SESAC. One such analogy was the license fees paid for performing rights by general establishments (bars, grills, restaurants, and taverns) using mechanical music not subject to a compulsory license such as tape recorders, record players, and music provided by non-live means. At that time, it was noted that the total of the annual minimum rates for the American Society of Composers, Authors and Publishers (ASCAP) and SESAC, Inc. amounted to $140. This was a minimum total annual fee for only ASCAP and SESAC. At the present time, the minimum annual fee charged by SESAC to bars, grills and nightclubs is $60 and of course, the total fees would be much higher after factoring in the minimum rates charged by ASCAP and by BMI - fees far greater than the total $50 fee determined as a fair rate by the CRT for jukebox operators. It is evident that the performing rights organizations have, in essence, already "compromised" with the representatives of the jukebox industry for a rate far lower than any in the general licensing area. In fact, in the Circuit Court's decision, the Court stated...

> "The arguably analogous musical fees provide substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark." (676 F. 2d 1157).

The $8 annual fee was a tremendous "bargain" and the $50 annual fee remains a "bargain". We must also note that before the new law, the U.S. was the only major country in the free world that did not pay creators for jukebox performances, and even the adjusted $50 annual rate represent a low fee as compared to fees paid by foreign jukebox operators.

A ONE-TIME FEE IS UNACCEPTABLE

The concept of a one-time buy-out fee of $50 is totally unacceptable because it endangers the copyright owner's right to collect royalties annually for performances through the years. If the life of a jukebox is, say, ten years, the fee would be much less than the $8 fee, which was recognized by Congress to be low. What happens to future uses of music on jukeboxes? How does one compensate for such uses? How do the writers of new music receive their fair share without a continuing annual royalty?

The proposed legislation disregards the basic underlying principle that creators of music receive a just and adequate compensation for the continuous use of their works. If the act were to become law, it would seriously damage the present copyright system of continuous payment to creators for ongoing use of their property.

S. 1734 is a retrogressive piece of legislation designed to serve the self-interest of the "coin-machine" industry. It is clearly a device to evade fair payment each year to creators whose music is performed on jukeboxes on a continuing basis. The problem is not in the law itself, but with the lack of compliance with the law. The reality is simple: that jukebox operators want to be the only group to avoid paying for performances of music each year. They want special treatment. Should user-violators be rewarded and creators be penalized?

Why should the will of the coin-machine industry force Congress to reject the compromise it embodied in Section 116 of the Copyright Law? There has been no showing on the part of the jukebox industry of any radical change in its economic condition to warrant such a radical change in the Copyright Law.

We urge you not to support the "Coin-Operated Phonorecord Player Copyright Act". The one-time buy-out for performances of music on jukeboxes would set a dangerous precedent harmful to the creator's right to receive a fair return for the use of his property in the future. The proposed legislation, if enacted, could lead to the dismantling of the economic structure of our copyright system.

QUESTIONS AND ANSWERS

QUESTION FROM SENATOR MATHIAS

At the hearing on June 20, all of the witnesses agreed that non-compliance with the current system of jukebox royalty payments is a very substantial problem. Several witnesses suggested alternative methods of collecting jukebox royalties as a way to increase compliance or to improve the equity of the collection system. I would appreciate your comments about both the practicability and the fairness of each of these proposals. The three proposed methods are as follows:

(1) Inclusion of a "performance right fee" in the price of recordings used in jukeboxes. (Obviously, some method would need to be found to avoid imposing this fee on non-commercial purchasers of recordings.)

(2) Imposition of a one-time royalty fee on jukeboxes, paid by the manufacturer or purchaser. This one-time fee would amount to a payment in advance of the annual fees now paid by jukebox operators. (S. 1734 proposes such a fee, but the amount of that fee could be different than that proposed in S. 1734.) This fee could be fixed permanently, or adjusted from time to time by a federal agency or by Congress.

(3) A pay-per-use system, in which jukebox operators would compensate songwriters based on the number of times that a jukebox is actually used.

QUESTIONS FROM SENATOR HATCH

(1) One of the other witnesses at the June 20 hearing stated that performing rights organizations such as yours have sued jukebox owners for more than $2,000 for a failure to pay a $25 or $50 fee. Would you comment on these charges, and more generally on your procedures for enforcing your rights under the jukebox copyright provisions?

(2) Senator Zorinsky commented at the June 20 hearing that songwriters benefit tremendously from the exposure that they get by having their songs played on jukeboxes, and that as a result jukebox royalty fees should be kept low. Do you agree with that comment?

(3) The number of jukeboxes registered with the Copyright Office has declined each year since 1979. Does this decline show that royalty fees are contributing to a shrinking of the jukebox industry?

(4) Assuming that the committee agrees with you that we should retain a system of continuing payments for continuing performances, would you consider a reduction in the annual royalty fee to reduce the burden on the jukebox industry?

ANSWERS FROM SESAC, INC.

SESAC, INC.,
New York, NY, August 9, 1984.

Senator CHARLES McC. MATHIAS, Jr.,
Committee on the Judiciary, Subcommittee on Patents, Copyrights and Trademarks,
Dirksen Building, Washington, DC.

Re: Jukebox Legislation S. 1734.

DEAR SENATOR MATHIAS: I was pleased to receive your letter of July 16, 1984 together with your additional questions as well as questions submitted by Senator Hatch. SESAC's responses are as follows:

A. RESPONSES TO QUESTIONS FROM SENATOR MATHIAS

(1) SESAC does not believe that the inclusion of a "performance right fee" in the price of recordings used in jukeboxes would be an administratively practical or workable alternative method of collecting jukebox royalties. As you indicated, one of the administrative problems is self-evident: The fee could only be imposed on recordings used in jukeboxes and not on those sold for non-commercial private uses. This would entail burdensome record-keeping as to sales and purchases of records. Furthermore, those records intended for non-commercial use might be obtained by operators for use in their machines. In our opinion, the commingling of a public performance fee for commercial users with the price for sales of records blurs the distinguishing feature of the public performance right, that creators receive continuing payment for continuing uses of their works.

(2) SESAC strongly opposes the imposition of a one-time royalty fee on jukeboxes paid by the manufacturer or purchaser. The reasons for our position against the

one-time fee concept were set forth in our statement submitted for the subcommittee hearing on June 20, 1984. We remain convinced that there is no compelling reason why one group of commercial users of music, whose sole product is music and who for years paid no fee for the use of music, should now be absolved from paying a continuing royalty each year for continuous performances of music when none of the other commercial users enjoys such special treatment under our Copyright Law. In our opinion, the proposal that a one-time fee (either permanent or adjusted from time-to-time) would amount to a payment "in advance of the annual fees now paid by jukebox operators" is illusory: How does one compensate for future uses of music on jukeboxes? How would creators of music be compensated adequately for performances of their works performed in jukeboxes in the final years of the useful life of a jukebox?

(3) If there were a truly accurate measure of the revenues generated by the use of each jukebox by customers each year, then SESAC would be willing to consider a system of payment based on a percentage of revenues that reflects such annual activity. However, we do not presently have any reliable data as to the annual revenue figures earned by jukeboxes, the actual number of jukeboxes that are in establishments, and the average life of a jukebox. Furthermore, the cost of providing such technology would most likely be more expensive for the jukebox industry than the current annual fee they claim is an economic hardship. Nevertheless, we would consider supporting such a system because it would, for the first time, provide the creators of music with a fair measure of revenues generated by performances of their works on jukeboxes.

B. RESPONSES TO QUESTIONS FROM SENATOR HATCH

(1) Suits for infringements are generally brought as the means of securing compliance with the law. Infringement suits are costly, and administratively time consuming: In this instance, they would require checking boxes at locations and monitoring individual uses, notifying the operator, preparing the legal documents either inhouse or through outside counsel. SESAC is not a litigation-oriented organization: We monitor certain users from time to time as a means of negotiating a SESAC license for public performances of the music in our repertory. This method has been successful in most cases, and is a cost efficient and practical solution to the problem of a user who refuses to recognize his legal obligation under the Copyright Law. Under Section 501 of the U.S. Copyright Act anyone who violates any of the exclusive rights of the copyright owner as provided under Sections 106 through 118 is an infringer. The minimum statutory damages for each infringement range from $250 to $10,000 and can run as high as $50,000 for willful infringement.

(2) We disagree with Senator Zorinsky's comment that songwriters benefit tremendously from the exposure they get by having their songs played on jukeboxes, for the reality is that jukeboxes benefit from the pre-established value of the song. A song is played on jukeboxes because there is a demand for the product, a need to hear a particular song. The popularity of the song has already been determined: Its use on the jukebox is another manifestation of its acceptance by the public. The heart of the matter is that the operators of jukeboxes are users of music: It is their only product. The rates for the public performance of music on jukeboxes should reflect a fair, continuing royalty for the creators of that music. It is already low in comparison to the license fees paid in the free marketplace by other users such as general establishments (bar, grills, restaurants, and taverns) using mechanical music not subject to a compulsory license. It already represents a bargain price and should not be discounted any further.

(3) Royalty fees are not contributing to any "shrinking" of the jukebox industry. Compliance was unacceptably low when the rate was set by Congress at the compromise entry fee of $8 per box per year and has steadily declined. How can the adjusted rate, now less than 14 cents per day, be seriously considered a factor for the continuing decline in compliance? The cost of the right to perform music on jukeboxes is not the reason. It is insignificant when compared to other normal business costs of being a jukebox operator. When non-compliance, estimated to be as high as 75% is permitted to exist on such a grand scale since 1978, it breeds more non-compliance. There's self-serving principle at work here in favor of the jukebox industry: The less they comply, the less they may have to pay. In other words, a reward for violating the law.

(4) We do not consider that the present annual rate is a "burden" on the jukebox industry. Therefore, we cannot talk in terms of a reduction in the annual royalty fee on that basis. The issue to be resolved is: Is it fair and equitable to examine the economic question of a license rate in light of the dramatic history of licensee non-

compliance? If compliance were to rise dramatically to approach the 100% level, then perhaps some consideration might be given to a further adjustment in the fee. At this time, we do not have any reliable data as to the total universe of jukeboxes in the United States. Once we know that figure, we may be in a more enlightened position to evaluate any fee adjustment. However, we think the good faith of the jukebox industry should be shown first through a steady increase in compliance.

I hope that these responses will assist the committee with their consideration of the issues. If you require anything futher on out part, please let me know.

With best wishes,

Sincerely,

VINCENT CANDILORA,
Executive Vice President.

Senator **MATHIAS**. Mr. David, there have been some discussions today about possible better ways to collect jukebox royalty fees. One of them was the suggestion that we should have a special type of record, a jukebox record, which would have a public performance fee built into the selling price, which would presumably be higher than that of the ordinary retail record.

Does this idea have any appeal?

Mr. **DAVID**. Mr. Chairman, it would seem to me by mingling the mechanical right and the performance right, there would be tremendous confusion, and I don't see how that would approximate finding an arrangement that would deal as close to the marketplace as it seemed the Congress intended and the Copyright Royalty Tribunal intended to find, a fee that was fair to all parties.

Senator **MATHIAS**. Mr. Cramer, and Mr. Candilora, do you have any comments on that?

Mr. **CRAMER**. I concur with Mr. David's comments in that regard.

Mr. **CANDILORA**. I do, also.

STATEMENT OF BERNARD KORMAN

Mr. **KORMAN**. Mr. Chairman, if I might, may I mention that this is not a new idea. That idea was floated decades ago. The jukebox interests presented it. It was considered and rejected long ago by the Congress. It is really another form of the present one-time payment. Senator Zorinsky mentioned that there are records that are never performed. Why should there be a performance fee paid for records that are never performed? How would the record manufacturers decide how many records to manufacture for jukeboxes?

Before the Copyright Royalty Tribunal, the testimony was that the jukebox operators bought the records made popular by radio. They don't select them. They follow us.

Senator **MATHIAS**. The question of what records to produce and put on the market goes to the question of what the market's appetite is. Mr. David has had the happy experience of having a number of hit songs. What is the curve? How long before you know it is a hit? Aside from knowing in your heart? [Laughter.]

Mr. **DAVID**. I trust the charts a bit more than my heart. I tend to always love my latest song, and I think now rather quickly today. I just had a new song out with Willie Nelson and Julio Iglesias, "All the Girls I Have Loved Before." Well, it is on its way down, but it was a big hit in the last few months.

I think we knew it was going to be a hit within weeks of the release of the record. It seems to me from my experience, that when my works go onto a jukebox machine, it goes on after the song becomes a hit, not before the song becomes a hit. It always seems the jukebox follows the success of the recording, rather than precedes it.

Senator MATHIAS. So that the market forces have to be perceived at some point, and can't always be anticipated?

Mr. DAVID. Correct.

Senator MATHIAS. Mr. Cramer, the $50 fee is a sort of an impersonal, arbitrary figure. It hits the prime location as well as the poor location. In your written statement you suggest that jukebox operators might pay copyright royalties based on a percentage of revenue. What would be the practical method of implementing that idea?

Mr. CRAMER. Well, there are several things. Of course, the best solution for this whole problem is to get the Copyright Tribunal out of this business, and let the free market forces work, like they do in other areas of licensing. But there could be ways in which there would be counters on the machine, and then the fee could be related to volume of business done in that machine.

That's not a great trick to do. A certain percentage of the gross revenue of the box, and some boxes will pay a lot more than $50, and some will pay a lot less, but that is not the bill that is before us.

Senator MATHIAS. Is there a counter on the boxes?

Mr. CRAMER. There is a limited counter on the box that tells you whether a record has been played. But there is no technological problem in my understanding of it which would prevent a more accurate account of the individual compositions or the total revenue of the box. Sure.

Senator MATHIAS. Such as the counters that we install in the vain hope of curbing Xerox copies here at the Senate.

Mr. CRAMER. That's no trick, Senator, you know. Just put a tamperproof counter on there and if that is the legislation, and I can only speak for myself with BMI, but I think we would consider it, but that is not what is before us—the one-time payment.

Senator MATHIAS. One thing that the witnesses at this hearing seem to have agreed on, and there are not many of those, is the difficulty of enforcing the current rules about license fees. Nobody is happy with that system. That is the one common note.

Mr. Candilora, do you have any magic formula for improving that?

Mr. CANDILORA. I think that first of all what has to be achieved is compliance. We have been looking at this issue for a number of years. We have started off with a phased-in—which was a compromise—$8 fee, and then to a $25 fee, and then to a $50 fee, so as not to hurt the jukebox industry which, by the way, songwriters do have a great appreciation for.

I mean, there have been tunes that they have written that have the words written, "Hey, mister, that is me up on the jukebox." They are proud of the fact.

They don't want to see the jukebox industry die, but they feel at the same time that, first, let that industry comply, 100-percent compliance with the law, and then once we have that, let's look at what the rate should be. I have to believe that the jukebox industry does have the capability to be able to tell us exactly how many boxes are out there, and how many boxes are complying, and the only suggestion that I personally could possibly make, I just make out of perhaps common sense, and that would be that we perhaps put a simple hold on this issue. The law that has been set and passed was that it would be $8, $25, $50.

What if we were to hold it for a period of 2 years at the $25 rate so that we could get 100-percent compliance, put the burden on the jukebox industry to give us 100-percent compliance, and then look at the rate and review it.

This is simply a personal opinion.

[Subsequent to the hearing, the following material was received for the record:]

SESAC, Inc.,
New York, NY, July 19, 1984.

Senator Charles McC. Mathias, Jr.,
Committee on the Judiciary, Subcommittee on Patents, Copyrights and Trademarks, Dirksen Building, Washington, DC.

Re: Jukebox Legislation S. 1734.

Dear Senator Mathias: SESAC wishes to express its appreciation to you for giving us the continued opportunity to express our views, along with those of ASCAP and BMI at the hearing held on June 20, 1984 on S. 1734—a matter that has such a significant bearing on the future of copyright.

As you are aware from the written statement submitted by SESAC and from my testimony at the hearing, SESAC strongly opposes the enactment of S. 1734. However, it is not our intention to reiterate here all the reasons offered in support of our position. I would like to, instead, focus on the underlying critical issue implicit in your question to me concerning "any magic formula" and my responses at that time.

The formula would, indeed, be magic or more accurately, mystical. Your committee's efforts to reconcile competing economic interests depends on the elimination of noncompliance. The very essence of the jukebox industry efforts during the many years of copyright version was to secure the protection of a statutory fee embodied in a compulsory license. I believe the explicit and implicit result of the protection offered by the statutory provisons should be full compliance. Further, the Congress in its wisdom, having replaced free marketplace pricing with complusory licensing should provide full compliance as the only equitable way to secure for the creators of music the consideration they deserve for having been deprived of the right to freely set the price for using their music in a jukebox.

My personal frustration about the inequities inherent in the dismal record of noncompliance caused me to give you an incomplete answer to your question at the hearing. Upon contemplation, my answer more properly should have been that the Senate legislative history on this aspect of the Copyright Law is the foundation upon which the Copyright Royalty Tribunal set the present $50.00 per box, per annum fee. The Courts have upheld the Tribunal's decision on the same criteria.

In short, my real concern is that we are now, once again, debating the issue in economic terms and ignoring the principle involved. The issue to be resolved is: Is it fair and equitable to examine the economic question of a license rate when there is a dramatic history of licensee noncompliance?

As a representative of SESAC, I stand squarely in support of our prepared statement and the $50.00 fee. My response to your question was one of total frustration over noncompliance. That emotion may have caused my response to be inartfully articulated at the time. This letter will set the record straight.

I respectfully submit these comments for your further consideration.

Sincerely,

Vincent Candilora,
Executive Vice President.

Senator **Mathias**. Mr. David, did you want to comment?

Mr. **David**. That is something that I just heard floated, and I don't see how that would address the problem when there was noncompliance with $8 a box, as Mr. Cramer mentioned earlier.

I think the basic problem starts before that. It seems to me the jukebox industry seems to be trying to make a virtue out of noncompliance, and if we make noncompliance a virtue and look at it for what it is, a violation of the law, I think we can address that problem and perhaps clarify it and work it out in a satisfactory manner.

Senator MATHIAS. Mr. Cramer?

Mr. CRAMER. Yes; I agree with that. As far as I am concerned, unless we get legislation that is a one-time payment, I am content with where we are now. But there should be better ways of assuring compliance. There are some simple amendments that would accomplish that.

Up until recently, it was very simple, a jukebox didn't comply, and you know what a problem it is. We have to send somebody into the establishment. It costs several hundred dollars to send an investigator around—per diem and hotel costs—to investigate it by sitting in the establishment for an hour or two and writing down the compositions that were played and then searching to see if the jukebox was licensed.

Now, there are a couple of simple things we could do. One is create a presumption that every song that is listed on the jukebox—it is a rebuttable presumption, but it would be a presumption—that those songs were played at least once during a 1-month period. If they aren't played, then the jukebox owner is going to take them out of there, because they are not going to clog up spaces for nonproductive usages.

So there is a time, maybe not a month—maybe it is 6 weeks—but some period of time where the numbers are removed if they are not played. So I would like to suggest we create a presumption that every one of those titles was played at least once during this period of time. That would eliminate much of the problem we had in getting compliance.

Secondly, I would also urge that the law be amended to provide that every violation is a willful violation, because by this time every jukebox operator in the United States knows about the jukebox law, and knows that he or she should be paying royalties. The willfulness element is important in the enforcement, so I suggest, Senator, that these two very simple changes would bring about substantial enforcement.

Senator MATHIAS. Before I turn to Senator Zorinsky, let me say that that bell ringing that you just heard means that the natives are getting restless on the Senate floor. The Senate is now debating a comprehensive nuclear test ban, and I may be called away before Senator Zorinsky has completed his questioning.

If that should be the case, when Senator Zorinsky is through with his questions, the committee will stand in recess subject to the call of the Chair.

The record will remain open for 4 weeks. Members of the committee may submit questions in writing to any of the witnesses who appeared today, and we will request witnesses to return their answers promptly, to be made part of the record.

Senator Zorinsky.

Senator ZORINSKY. Thank you, Mr. Chairman.

Mr. Korman, do you support overturning the Supreme Court decision in the *Sony-Betamax* case and, if so, do you support Senator Mathias' bill for a one-time copyright fee on those machines?

Mr. KORMAN. Yes, sir; I do.

Senator ZORINSKY. Just for a one-time fee on it?

Mr. KORMAN. It is a recording right, and for a recording right, that is a one-time act, unlike a continuing performance. I think that was in Mr. Ladd's statement.

Senator ZORINSKY. Very well. Do you agree with the personal proposal of Mr. Candilora of trying for 2 years a $25 fee to see if the higher of 100 percent compliance can be reached?

Mr. KORMAN. If I understood Mr. Candilora, that proposal was conditioned on 100 percent compliance. I don't know how that could possibly work, frankly. I would like to think about it. It is a brandnew idea, and I don't know how anybody in this industry can assure 100 percent compliance.

Let me say, Senator, that I believe that the AMOA has done a wonderful job in trying to spread the word through the industry that each operator should comply. Notwithstanding that fact, there are only 2,000 operators who are members of AMOA out of about 12,000 in the country.

They were not able to secure their objective. Being realistic, I think Mr. Candilora is being idealistic. I think there is no way of achieving that.

Senator ZORINSKY. I agree with you. I don't think, you know, I daresay if we called the IRS and asked them how much compliance they are getting on income tax payments we would be short of 100 percent somewhere along the line. So, not being Utopic, would you settle for 95 percent at $25?

Mr. KORMAN. Senator, I don't think we will get anything like 95 percent.

Senator ZORINSKY. What percentage are we going to reach?

Mr. KORMAN. Let me say this, sir. The $50 fee is a real bargain for the jukebox industry. It represents about a 75-percent discount from what is paid, at a minimum, when someone has his own record player of tape player in a restaurant and pays fees separately to ASCAP, BMI, and SESAC.

Senator ZORINSKY. I would expect someone that represents that agency to say exactly what you said, and I suppose I could call on the attorney from the other side who might disagree with that being a reasonable figure, but Mr. Candilora, you indicated that Chip Davis, my constituent, probably is very unhappy with my position on this.

I don't intend or mean to take his livelihood away from him, and I hope he understands that. And as I understand, the total amount of money we are talking about, and I guess it is more principle, as Senator Mathias pointed out, but the dollars involved are about 1.5 to 2 percent, as I understand, of the total moneys collected for royalties on behalf of your organizations. So by the time you distribute it down, and for the record we will submit asking you to show, you know, how much money the lesser, unknown artists or composer received as opposed to someone who has a big hit and things of that nature, and I suppose that wouldn't really make the difference whether Chip Davis could have a condominium in Palm Beach or not.

But I would like to say that you forgot to mention my constituents Gary Witt, Ted Nichols, Ed Kort, and Roy Smith. You probably never heard of them.

Mr. **Candilora**. Senator, I can only say that Chip Davis is a writer affiliated with SESAC. I, being here, feel that I represent him. He is a composer.

Senator **Zorinsky**. A good one, too.

Mr. **Candilora**. In Omaha, who has a good business going in Omaha there. I think what disappointed him the most was the fact that he was called to testify, his views were given in 1975, there was a law passed in 1976, and that the system allows for us to just bring this matter up totally again without any research being done that he, being a constituent of yours, was never consulted, you know, looked at.

Senator **Zorinsky**. Would you inform him that we did have hearings, and that we didn't sneak this up on anybody, because we did have hearings, and unlike last year's venture, where I helped exempt the charitable organizations from your grasp, which was maybe more of a sudden attack, that, certainly compared to this, I think this is an honorable thing that we are going through. [Laughter.]

And that there are hearings, and that is the purpose of this, so please inform him that I didn't wake up one morning and decide to slip this through. He will have ample opportunity to write me and get input.

Incidentally, everybody acts like this is frozen in cement. Everybody says, "Yes, but this bill says a one-time thing, and it says $50." Look it, I have been here just long enough to know that some of these bills, by the time you get through amending them, don't even look like the same bill you started with.

So for us to say, "Yes, but this is what it is," doesn't mean it can't be changed, and in no way do I want to imply that I am going to force something upon anyone. I would hope that we can negotiate something that is equitable for both parties, because that is what this is all about.

You know, I have got a lot of people unhappy with me in Nebraska, even more than Chip Davis might be, inasmuch as I am supporting the MX missile, and 31 of them are going into Nebraska. So those people have got some concerns about me, too.

Mr. **Candilora**. My opinion, Senator, was one that was personal, and certainly not one of SESAC's.

Mr. **Zorinsky**. I am not going to take any more time here, but I want to thank you very much for taking your time to come testify and appear before the hearing.

We are in adjournment until the call of the Chair.

Mr. **Cramer**. Thank you, Senator.

Mr. **David**. Thank you.

Mr. **Candilora**. Thank you, Senator.

[Whereupon, at 12:08 p.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

AMERICAN FEDERATION OF MUSICIANS
OF THE UNITED STATES AND CANADA
AFFILIATED WITH THE A.F.L.-C.I.O

OFFICE OF THE PRESIDENT
Victor W. Fuentealba
500 Broadway
New York, N. Y. 10036
(212) 869-1330

June 20, 1984

STATEMENT

TO: Senate Subcommittee on Patents, Copyrights and Trademarks; Chairman, Senator Charles McC. Mathias

FROM: Victor W. Fuentealba, President, American Federation of Musicians

SUBJECT: S.1734, The Coin-Operated Phonorecord Player Copyright Act.

My name is Victor W. Fuentealba and I am President of the American Federation of Musicians, whose membership of over 250,000 professional musicians is opposed to Senate Bill 1734.

The American Federation of Musicians is seriously disturbed at the attempt of jukebox operators to avoid the reasonable, long-established economic principle for copyright protection of continuing payment for continuing use.

Congress is empowered by the Constitution to promote the Arts by securing exclusive rights for authors -- such as composers of music -- to the use of their compositions. The one-time ridiculously low buy-out royalty payment proposed in S.1734 would discourage the songwriters of America and thereby damage rather than promote the arts in our nation.

The professional musicians in the United States have a particular, economic reason for their opposition to S.1734. Businesses who use live musicians in their operations are required to make continuing royalty payments to composers for continued use of their compositions. The American Federation of Musicians has never quarreled with this; we have always recognized the right of composers to receive royalty payments when our members play their compositions for the benefit of third parties. Now, however, jukebox operators are asking Congress to discriminate against the performing musician -- who is often replaced by a jukebox -- by not requiring, continuing, reasonable royalty payments from jukebox operators who promote the use of a device instead of live musicians to play the composers' music.

The American Federation of Musicians respectfully urges the Subcommittee to report unfavorably on S.1734.

the songwriters guild

Lewis M. Bachman
Executive Director

276 Fifth Avenue, New York, N.Y. 10001
(212) 686-6820

July 10, 1984

Senator Charles McC.Mathias, Chairman
Sub-Committee on Patents, Copyrights
and Trademarks
Senate Russell Office Building
Room 387
Washington, D.C. 20510

Dear Senator Mathias:

I was present at the Juke Box Bill hearing before your Sub-Committee on June 20, and I would like to comment on some of the remarks made by the MOA panel.

I find it not only unfair, but shortsighted and ironic that the operators want to "lower the boom" on the very people who supply the one product without which they'd have nothing to operate. There'd be no juke box industry "Without A Song"; it's like building a giant telescope and forgetting to include the lens. Try looking at the stars that way.

If there were language lessons on the record, no coins would be deposited; if there were a political speech on the record, no coins would be deposited.

It's the song that keeps the customers in the bar, and persuades them to part with their quarters.

As far as the statement that boxes make hits is concerned: operators are not such naive business men as to invest their capital in an unproven product. They wait for the song to make it, then they jump on it. The only time they purchase a record immediately upon its release, is when the artist is so popular that a certain amount of coins will be deposited on the strength of his/her name alone. Otherwise, operators play a waiting game.

Under the operator's one-time fee suggestion, it is sad to think that they condone the notion that it is perfectly o.k. for a young composer (who comes up with a smash in two or three years from now, and fills the pockets of the operators), not to earn one cent royalty as a result of his/her creativity, when the hit is performed on the boxes already licensed.

Continued payment for continued use is what copyright, and fairness, is all about, and, on behalf of the 5,000 members of the Songwriters Guild, and their families and friends, I respectfully urge you and your colleagues on the Sub-Committee to defeat this attempt to undermine the Copyright Law of 1976, and the concept behind it.

Sincerely,

George David Weiss